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ABSTRACT

A collection of 12 articles, this yearbook focuses on freedom of speech and censorship. The topics covered include (1) common law tort and contract erosion of the at will rule, (2) the Supreme Court and the First Amendment in 1983-1984, (3) a phenomenological analysis of the First Amendment and the issue of obscenity, (4) John Milton's attack on prior restraint in "Areopagitica," (5) the information society as a new threat to freedom of speech, (6) Plato and the totalitarian state, (7) the rationale and development of an employee rights scale, (8) the Massachusetts Bay Colony and its problems with convenant and rhetorical deviance, (9) the regulation of pornography in the new media, (10) perspectives on pornography and free speech, (11) x-rated political broadcasting, and (12) freedom of speech and the Federal Election Campaign Act. (EL)

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COMMON LAW TORT AND CONTRACT EROSION OF THE AT WILL RULE: NEW PATHS TOWARD FREEDOM OF SPEECH IN THE PRIVATE SECTOR WORKPLACE

Wayne C. Sanders
The National College of Education, Creve Coeur

I. INTRODUCTION

In the United States, private sector employees who do not enjoy a contract for a fixed term are subject to a century old common law principle know as the at will rule.[1] Under the at will rule, employers have the power to dismiss employees for a good reason, a bad reason, or no reason at all. Given the competitive pressures of commerce and the occasional human failing of acting with caprice or malice, it should not be surprising that managers have used their near absolute power of dismissal to retaliate against such communicative acts as refusing to cajole gasoline dealers into fixing prices,[2] giving truthful testimony in an anti-trust suit,[3] complaining about food and drug violations,[4] informing police authorities about a fellow employee who was stealing from a financially troubled company,[5] reporting accounting irregularities in a publicly regulated utility,[6] complaining about unsafe oil and gas pipe which was later removed from the market,[7] and other reasons just as alarming.

The problem of suppression of employee speech becomes more important as the role of organizations expands in United States. William Scott and David Hart, in their landmark book Organizational America, argue that the greatest transformation to occur in America during the past two decades ". . . has been the consolidation of power into modern organizations, led by a managerial elite, and maintained by a cadre of professional managers."[8] Coupled with this shift in power was a shift of public attention to issues closely associated with organizations such as toxic waste, defense spending, nuclear power, sexual discrimination in the workplace, consumer product safety, energy policy, plant closures and other topics just as important. The members of the community most likely to be informed about specific aspects of these issues are the employees of private sector organizations. The absence of their voices makes freedom of speech concerning these issues anemic.

The Breakdown of the At Will Rule

In the past decade the at will rule has come under an increasing chorus of unfavorable criticism. The extent of this criticism is reflected in this recent note in the Harvard Law Review: "A veritable avalanche of scholarly opinion has, with near unanimity, come down in favor of abolishing the at will rule."[9] A similar note in the *Connecticut Law Review* maintained: "Whichever rationale commentators believe supported the employment at will rule during its early stages of its existence, they have unanimously advocated the rule's demise, or at least its modification."[10]

At the same time, the legislatures and the courts began to accelerate the erosion of the at will rule. The erosion most relevant to freedom of speech has come in three areas. The first area is First Amendment guarantees. Since the First Amendment only constrains government action, or government-like action through the concept of state action, its utility for private sector employees is limited.[11] The second area is statutory measures. Here a wide range of state and federal statutes protect speech on certain narrow topics and some states, such as Connecticut and Michigan, go so far as to protect the speech of employees who report any illegal activity.[12] The final method, and the topic of this article is common law erosion by means of tort of wrongful discharge actions or breach of contract actions.

The Importance to Freedom of Speech Scholars

In the area of freedom of speech for private sector at will employees, the First Amendment is rarely relevant. However, this does not mean that there is no hope for freedom of speech and other important civil liberties in the private workplace. Rather, freedom of speech must spring from other area of legal authority such as torts and contracts.

Freedom of speech scholars must not shy away from the implications brought about by changes in other areas of law. It is far too late in the day for free speech scholars to limit their scholarship artificially to the well worn paths of First Amendment analysis. In order for scholars to study free speech in relation to the important organizational issues of our time, they must aggressively examine other areas of law where employee rights in general and freedom of speech rights in specific are developing.

Research Procedures

The research procedures for this study were simple. An exhaustive search was made for relevant federal and state court decisions from 1956 to the present. The search was made by using the Master and Servant section of *West's Decennial Digests*[13] and *West's General Digests*.[14] The cases were then analyzed and categorized.

II. A RATIONALE FOR EMPLOYEE FREE SPEECH

When the First Amendment was written, workers in the United States and England usually did not work in organizations. "A very considerable proportion of all servants were in domestic service and even those employed on the farm as agricultural workers and those serving as craftsmen or small traders were often attached to the household . . . ."[15] It should not be suprisin[then that in many reference works the law concerning the employment relationship is still referred to the law of master and servant. In fact, well into this century, a common place to find discussions on employment was in treatises on the law of domestic relations or, as we now call it, family law.

Employment in large organizations has really been common for only a hundred years. "At the time of the adoption of the termination-at-will rule in the middle of the nineteenth century, less than half of all employed people were wage and salary workers. By 1950 it was 80% and by 1970, 90%."[16] We have become a nation of organizational employees.

The founding fathers probably failed to envisage our modern organizational economy, where the six largest U.S. corporations now have more employees than the combined original 13 colonies had citizens in 1776.[17] However, the problems brought on by an organizational economy have not escaped the attention of modern commentators. Alexander Meiklejohn argued that, "On the whole the 'liberties' of what we call 'Free Enterprise' are, I think destructive of the 'freedoms' of a self-governing society. The unregulated self-seeking of the profit-makers is much more dangerous in its effect upon the morality and intelligence of the citizen than that participation in regulatory action for the common good to which free enterprise has so often shown itself hostile."[18] Thomas Emerson, in his landmark book *The System of Freedom of Expression* devoted an entire chapter to the protection of freedom of expression from private centers of power. He warned:

> A system of freedom of expression that allowed private bureaucracies to throttle all internal discussion of their affairs would be seriously deficient. There seems to be general agreement that at some points the government must step in. In any event the law is moving steadily in that direction.[19]

If protections come, they must come from non-constitutional sources of legal authority such as tort and contract law.

Freedom of speech protections for private sector at will employees are justified for two reasons. First, freedom of speech by employees would enhance public debate concerning organizational issues. Second, freedom of speech would enrich the dignity of employees as individuals.

Enhancing Public Debate

The interest of the public in maintaining informed debate about powerful private organizations has become more important as these organizations become increasingly interdependent with each other, the government and society in general. Informed public debate is important because citizens, through their elected representatives, should have the necessary information to decide how their government should regulate (or deregulate) private organizations. In this century, government regulation of private organizations has expanded at a rapid rate. The creation of the FTC, ICC, NLRB, FCC, SEC, EPA, OSHA, and other legislation illustrates the pervasive role taken by government in regulating organizations for the public good. Because government must make decisions about regulation or deregulation, free speech by members of private organizations, the people who have first hand knowledge of organizations, is crucial.

It is ironic that the Supreme Court has recognized the First Amendment importance of public debate about organizations but is unable, because of the wording of the First Amendment, to prohibit employer retaliation against outspoken private employees. In *Pickering v. Board of Education*, Justice Marshall, writing for the Court, found that public employees are ". . . the members of a community most likely to have informed and definite opinions . . ." about their organizations and that ". . . it is essential that they be able to speak out freely without fear of retaliatory dismissal."[21] In *Virginia State Board of Pharmacy v. Virginia Consumer Council*, the United States Supreme Court ruled that even commercial advertising ". . . is indispensable to the proper allocation of resources in a free enterprise system, [and] it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered . . . ."[22] If it is important to get this information out of organizations and into public debate, it follows that freedom of speech for private sector employees might go far toward enhancing public debate about private organizations.

Enriching Employee Dignity

In society at large, freedom of speech is seen as fundamental to the self-fulfillment of individuals. Franklyn Haiman suggested that, "[s]ymbolic behavior is one of the most fundamental ways in which human beings express and fulfill themselves. Its exercise thus lies at the core of a free society."[23] Thomas Emerson argued that, ". . .[t]he proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence, suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature."[24] If individual freedom of speech is important for Americans in society at large, perhaps it would be a tonic for Americans in their roles as private sector at will employees.

Many organizational theorists have lamented that the modern organization puts tremendous strain on the individuality and dignity of employees.[25] William Scott and David Hart go so far as to argue that what they call the organizational imperative is fast displacing the individual imperative and might eventually lead to a drift toward totalitarianism in America.[26] While one might disagree with the breadth of their ultimate conclusions, it is difficult to dispute their contention that modern managers are generally driven and rewarded for behavior which treats the welfare of the organization as paramount. Driven by the values of rationality (or seeking efficiency), stewardship, and pragmatism, managers are usually not concerned with humanistic, individual-centered values unless such concern is important to the welfare of the organization.

Freedom of speech for private sector at will employees would go far toward enriching the dignity of employees as individuals. Professor Lawrence Blades, of the University of Kansas Law School, in a famous early attack on the at will rule maintained:

> [L]egal protection for the abusively discharged employee would inevitably develop a keener awareness of, and greater respect for, the individuality of the employee. Indeed, it is conceivable that this consciousness of employee individuality would do much toward solving the dilemma of the organizational man,

the employee in middle management whom William H. Whyte saw as too prone to identify with his employer and especially subject to the power of his employing organization.[27]

The importance of protecting the contributions to public debate and the individual dignity of private sector at will employees is underscored by the number of employees involved. Although, approximately 25% of the United States non-agricultural workers belong to unions and of those, approximately 95% have collective bargaining agreements which feature grievance and arbitration procedures in cases involving discipline or discharge, most private employees have no contract for a fixed term and thus, are employees at will.[28] It is estimated that between 60% and 75% of private sector non-agricultural employees are terminable at will.[29] This amounts to from seventy to eighty million workers.[30]

No one knows with any degree of certainty how many times employers use their power of arbitrary dismissal, but estimates of employees who have lost their jobs at will but would have kept them under a "just cause" standard range from a conservative 6,000 dismissals per year to a high of 200,000 dismissals per year.[31] Ironically, the existence of arbitrary dismissal at will may well conceal the true extent of its use as a coercive tool. "Any difficulty in assessing the exact extent of the danger may well be attributable to the fact that where the exercise of individual freedom is not guaranteed there is no freedom to complain."

III. THE DEVELOPMENT OF TORT AND CONTRACT REMEDIES

During the last decade, a growing number of state courts have sought to buffer the harshness of the at will rule by establishing common law exceptions based on tort and contract theory. Many of the cases involve freedom of speech issues and many, although not concerning freedom of speech, involve legal principles which might apply to freedom of speech cases.

The common law erosion of the at will rule has not occurred in a neat series of steps because common law is changed on a state by state basis--the result of individual court decisions which usually involve fairly narrow issues. When a state court creates an exception to the at will rule there is no guarantee that other exceptions will be made. For example, a ruling establishing a common law remedy for employees who are fired for refusing to commit an illegal act, such as perjury, does not necessarily mean that a remedy will be established for employees who are fired for refusing to neglect a statutory duty, such as food inspections. There is even less probability that other states will create similar exceptions. Indeed, many states indefatigably cling to an absolute at will position and refuse to establish any exceptions to the at will rule.

However, ideas, if not precedent, are free to cross state lines. Most opinions recognize the reasoning used by the courts of other states and it would be naive to assume that the state justices and judges are not influenced by their reasoning. The result of these factors is a complex trend of at will erosion.

Tort of Wrongful Discharge Actions

First, by using a tort strategy, the limitations of the contractual principle of mutuality of obligation can be avoided. Many courts require that mutuality of obligation, or extra consideration, be present if an at will employment relationship is to be subject to a breach of contract action.[33] The reasoning is that if an employer is willing to limit his/her right to dismiss an employee at will, then the employee should be required to offer something in addition to his/her paid labor. Although the symmetry of this concept is appealing, many employees are not in a position to offer something of value beyond their labor, and do not enjoy the bargaining power to demand a written contract which would force employers to act in a humane manner by requiring that dismissals be made only for cause. A few courts have been sympathetic to the plight of at will employees and have not demanded mutuality of obligation but, rather, have held that an employee's labor is all the consideration that is needed to pursue a breach of contract action.[34] Such courts are rare and represent hope for only a tiny fraction of the country's at will employees.

However, mutuality of obligation does not trouble all common law remedies. Since tort of wrongful discharge actions are based on tort theory and not contract theory, there is no need to prove mutuality of obligation and that whole issue can be avoided.

The second advantage to the tort approach is that ". . . punitive damages are normally recoverable in tort, but not in contract actions. Since the purpose of punitive damages is to punish the defendant and to deter others from engaging in similar conduct, forcing employers found guilty of wrongful discharge to pay exemplary damages would further the interests of both the employee and the community."[35]

The courts have used two broad categories of standards for pursuing tort of wrongful discharges. The first is where the employee can show that she/he was dismissed in contravention of a specific public policy found in statutes or state constitutions. The second is where the employee can point only to general public policy not specifically grounded in statutes or constitutions.

1. Statutorily Defined Public Policy The vast majority of states which allow tort of wrongful discharge actions require that they be based on statutorily defined public policy. In other words, employees who are forced to commit an illegal act, give up a stAtutory right, or foresake a statutory duty might be able to pursue a tort of wrongful discharge action. Each state is governed by its own precedent and might allow tort of wrongful discharge actions for all, several, one, or none of the above reasons. The development of common law precedent is often a slow cautious process.

The earliest exception and one which often involves speech, is the refusal to commit an illegal act. Several courts have ruled that an employee can pursue a tort of wrongful discharge when the employee is dismissed for refusing to lie before legislatures or courts.[36] Others have suggested that such an action would be appropriate where employees are forced to alter reports to regulatory agencies.[37]

A second area of statutorily defined public policy based actions is where employers retaliate against employees who exercise their statutory rights. Most cases involve dismissal in retaliation for filing workman's compensation claims and have little to do with speech unless speech is defined so broadly that filing a claim is seen as the modern version of engaging in forensic speech.[38] Pennsylvania, in a case concerning the right not to speak, allowed the use of a tort of wrongful discharge action by an employee who was dismissed after taking an illegal polygraph examination. Polygraph examinations in employment testing are banned by Pennsylvania statutes.[39]

A final category of statutorily defined public policy tort of wrongful discharge actions involves dismissals in retaliation for performing, or complaining about not being able to perform, a statutory duty. The most common duty addressed by the courts is jury service, which has little to do with speech.[40] However, other duties, or the complaints surrounding those duties, are more relevant to the interests of freedom of speech scholars. Employees have been allowed, by some courts, to pursue tort of wrongful discharge actions after they had been fired for fulfilling a duty to cooperate with police in the investigation of theft by a fellow employee in a financially troubled company,[41] complaining to a superior about a duty to keep a pharmacy open during prescribed hours,[42] fulfilling a duty to refrain from anti-competitive pratice[,[43] and fulfilling a duty to file reports showing violations of food and drug standards.[44]

While statutorily defined public policy based tort of wrongful discharge actions may offer some free speech protections for private sector at will employees, the protection is limited to things that the legislatures have outlawed, made a statutory right or have made a statutory duty. In other words, the legislatures control the topics that are protected.

2. General Public Policy

Torts of wrongful discharge, based on statutorily defined public policy have become relatively common. However, state courts, which allow tort of wrongful discharge actions based on general public policy are rare. Yet, this is the area where the greatest expansion of freedom of speech might occur.

The most common tort actions based on general public policy involve complaints by employees about illegal activities. In Harless v. First National Bank of West Virginia, the Supreme Court of Appeals of West Virginia ruled that "manifest public policy" could be the basis for a tort of wrongful discharge action by an employee who was fired after complaining about violations of consumer credit laws that he observed.[45] In Adler v. American Standard Corporation, the United States District Court for the District of Maryland held that an employee who complained about violation of tax laws, anti-trust laws, and corrupt practices laws could pursue a tort of wrongful discharge action because ". . .a violation of the law is a violation of the public policy of the law, and a discharge to cover up such a policy violation is itself a policy violation."[46] Finally, in Petrik v. Monarch Printing Corporation, the Appellate Court of Illinois, First District, Second Division, held that an employee who complained that discrepancies in financial records might possibly be caused by criminal conduct could pursue a tort of wrongful discharge action.[47]

These cases can be distinguished from the cases based on statutorily defined public policy because the employee is not asked to commit an illegal act, give up a statutory right, or foresake a statutory duty. However, in most of the cases, employees are reporting illegal activities even if they themselves are not involved. Thus, the legislatures, by making something illegal in the first place, still control what topics are relevant to genuine public policy concerns. If an employee complains about something which may be immoral, but not necessarily illegal, a tort of wrongful discharge action might not be allowed.

Yet, torts based on general public policy topics, not articulated by the legislatures in statutes, might be on the way. A recent case, arising from Pennsylvania, might be the harbinger for an expansive system of free speech, not necessarily based on statutory topics, but rather based on an unrestrained and wide open range of topics. In Novosel v. Nationwide Insurance Company, the United States Third Circuit Court of Appeals, sitting in diversity under Pennsylvania law, held that a tort of wrongful discharge could be based on the general expressions of public policy found in the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution.[48] The case arose when John Novosel, a district claims manager and a 15 year employee of Nationwide Insurance, alleged that he was fired for refusing to participate in lobbying the Pennsylvania legislature concerning a no-fault insurance reform act.

Judge Adams, writing for the Court, argued that public policy need not be grounded in statute and thus opened the door to a much more expansive definition of public policy which, if followed, would almost certainly greatly expand the scope of protected free speech:

> Given that there are no statutory remedies available in the present case and taking into consideration the importance of the political and associational freedoms of the federal and state Constitutions..., a statutory declaration of public policy can be derived in this case from either the First Amendment of the United States Constitution or Article I, Section 7 of the Pennsylvania Constitution.
>
> The key question in considering the tort claim is therefore whether a discharge for disagreement with the employer's legislative agenda or a refusal to lobby the state legislature on the employer's behalf sufficiently implicate a recognized facet of public policy. The definition of a "clearly mandated public policy" as one that "strikes at the heart of a citizen's social rights, duties and responsibilities...," appears to provide a workable standard for the tort action. While no Pennsylvania law directly addresses the public policy question at bar, the protection of an employee's political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a worker's compensation claim.
>
> . . . .

> Although Novosel is not a government employee, the public employee cases do not confine themselves to the narrow question of state action. Rather, these cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities.[49]

It seems that the theory, expressed in the *Novosel* case brings the courts nearly full circle. If the holding withstands subsequent decisions by the Pennsylvania Supreme Court and is adopted by other states, the First Amendment might be applied to private sector employees in a manner similar to the way it applies to government employees. Just as the Fourteenth Amendment is used as a vehicle to apply the First Amendment to the states, tort of wrongful discharge actions might be used as the vehicle to apply First Amendment protections to private sector at will employees.

Breach of Contract Actions

A second area of common law authority which might foster free speech for private sector at will employees is contract theory. A small minority of state courts have allowed breach of contract actions to be pursued by abusively discharged at will employees. These courts have not been constrained by the concept of mutuality of obligation and have not demanded extra consideration in addition to an employee's labor. They treat all employment as a normal contractual relationship subject to traditional contract standards.

The extant cases do not deal with free speech problems but the principles used to protect other important employee rights might readily be applied to free speech issues. Compared with tort cases, there have been few contract cases.

Breach of contract actions, like tort actions, can be divided into two broad categories. The first and most important contain breach of contract actions based on statutorily defined public policy and the second, but potentially most important, contain actions based on a standard of good faith and fair dealing.

1. Statutorily Defined Public Policy The most common type of breach of contract action is based on statutorily defined public policy and, in this regard, is virtually indistinguishable from tort of wrongful discharge actions. Of course exemplary damages are not normally available in breach of contract actions. Employees have been allowed to pursue breach of contract actions after being fired for such things as refusing to perform medical procedures they were not trained for[50] and refusing to participate in illegal price fixing.[51]

2. Good Faith and Fair Dealing Several courts have adopted a fairly broad standard of good faith and fair dealing. The standard has been used as a basis for breach of contractactions by employees who have been fired for refusing sexual advances by supervisors,[52] as a method of avoiding paying bonuses,[53] and in retaliation against union activity.[54]

The meaning of the term good faith and fair dealing varies from court to court. To one it means that the contractual parties not violate community standards of "decency, fairness, and responsibleness."[55] To another it means that ". . . there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . ."[56] Whatever definition is used, it is clear that the concept of good faith and fair dealing is wide enough to accommodate the protection of a wide variety of employee rights including the possibility of free speech rights.

IV. CONCLUSIONS

For nearly a century the grossly unequal bargaining power of organizational employers combined with near absolute power of dismissal at will has meant that the speech of private sector employees has been subject to the most outrageous suppression. The high proportion of United States workers who are at will employees and the emerging importance of issues associated with private sector organizations underscores the dangers to our democracy of allowing wholesale suppression of one of our most basic freedoms.

Yet, a slow but steady common law erosion of the venerable at will rule has come from tort and contract theory. A small but growing minority of states have allowed tort of wrongful discharge or breach of contract actions as a method of protecting vulnerable at will employees from employer retaliation against speech.

Common law is one of the slowest legal areas to respond to neded change but once movement begins, as Justice Cardozo observed in a lecture at Yale University in 1921, it seems". . . to have behind [it] the power and the pressure of the moving glacier."[57]

The common law erosion of the at will rule presents a fresh and vital challenge to freedom of speech scholars as well as organizational communication scholars. A new, and perhaps more humane, relationship between employer and employee is emerging which will probably forever alter United States employment as we know it. The new frontier of free speech is found in the workplace.

Endnotes

[1] The at will rule is generally associated with an 1886 treatise on Master and Servant Law. See: Horace Gray Wood, *A Treatise on the Law of Master and Servant*, 2nd ed. (San Francisco: Bancroft-Whitney, 1886); Despite the rapid acceptance of the rule, Wood's analysis was at least partially erroneous. See: Jay Feinman, "The Development of the Employment At Will Rule," *American Journal of Legal History*, 20 (1976). 123.

[2] *Tameny v. Atlantic Richfield Company,* 610 P.2d 1330 (Cal. 1980).

[3] *Phillips v. Goodyear Tire & Rubber Company,* 651 F.2d 1051 (5th Cir. 1981).

[4] Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980).

[5] Palmateer v. International Harvester Company, 421 N. E.2d 876 (Ill. 1981).

[6] Suchadolski v. Michigan Consolidated Gas Company, 316 N.W. 2d 710 (Mich. 1982).

[7] Geary v. United States Steel Corporation, 319 A.2d 174 (Pa. 1974.

[8] William Scott and David Hart, Organizational America (Boston, Houghton, 1979), p.viii.

[9] "Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception,"Harvard Law Review, 96 (1983), 1931.

[10] "Guidelines for a Public Policy Exception to the Employment At Will Rule: The Wrongful Discharge Tort," Connecticut Law Review, 13 (1981), 620.

[11] A great deal of recent judicial attention has been given to the free speech of government employees. See: Pickering v. Board of Education, 391 U.S. 563 (S. Ct. 1968); Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (S. Ct. 1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (S. Ct. 1979); Connick v. Myers, 103 S. Ct. 1684 (1983); In rare circumstances, these principles can be applied to private employment via the state action concept. See: Holdnak v. Avco Corp., Avco-Lycoming Division, 514 F.2d 285 (2nd Cir. 1974); Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981).

[12] See: Connecticut Sec. 1(b), P.A. 82-289, L. 1982; Michigan Sec. 2, P.A. 469, L. 1980.

[13] West's Eighth Decennial Digest (St. Paul: West); West's Ninth Decennial Digest (St. Paul: West).

[14] West's General Digest (St. Paul: West).

[15] Otto Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment," The Law Quarterly Review, 93 (1977), 509.

[16] "The Employment At Will Rule," Alabama Law Review, 31 (1980), 431.

[17] See: David W. Ewing, Freedom Inside the Organization: Bringing Civil Liberties to the Workplace (New York: McGraw, 1977), pp. 12-14.

[18] Thomas Emerson, The System of Freedom of Expression (New York: Vintage, 1970), p. 677.

[19] Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (New York: Harper, 1960), pp. xv-xvi.

[20] Emerson, The System of Freedom of Expression p. 677.

[21] 391 U.S. 563, 572 (1968).

[22] 425 U.S. 748, 765 (1976).

[23] Franklyn S. Haiman, Speech and Law in a Free Society (Chicago: University Chicago Press, 1978), p. 6.

[24] Emerson, p. 6.

[25] For example see: William H. Whyte, Jr. The Organizational Man (Garden City, N.Y.: Anchor Books, 1956); Chris Argyris, Personality and Organization (New York: Harper, 1957); W. J. Heisler and John W. Houck, ed. A Matter of Dignity: Inquiries into the Humanization of Work (Notre Dame, Ind.: University Notre Dame Press, 1977).

[26] See: Scott and Hart.

[27] Lawrence E. Blades, "Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," Columbia Law Review 67 (1967), 1410.

[28] Cornelius Peck, "Some King of Hearing for Persons Discharged From Private Employment," San Diego Law Review, 22 (1977), 315.

[29] See: Cornelius Peck, "Unjust Discharges From Employment: A Necessary Change in the Law," Ohio State Law Journal 40 (1979), 1-49; Samuel Estreicher, "At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response," New York State Bar Journal, 54 (1982), 146-9, 170-5.

[30] Peck, "Unjust Discharges". "Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception," Harvard Law Review, 96 (1983), 1931-51.

[31] Peck, "Unjust Discharges From Employment," p. 39.

[32] "Protecting Employees At Will Against Wrongful Discharge," p. 1935.

[33] Blades, p. 1410.

[34] For example see: Rowe v. Noren Pattern and Foundry Company, 283 N.W.2d 713 (Mich. 1979); AFL-CIO v. University of Alabama, 599 F.2d 56 (Ala. 1979).

[35] For example see: Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974); Fortune v. National Cash Register Company, 364 N.E. 2d 1251 (Mass. 1977); McNulty v. Borden, Inc., 474 F.Supp. IIII (ED Pa. 1979); Magnan v. Anaconda, 429 A.2d 492 (Conn. 1980); Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722 (1979).

[36] "Employment At Will Rule," p. 45.

[37] For example see: Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396.

[38] See: Frampton v. Central Indiana Gas Company, 297 N.E.2d 425 (Ind. 1973); Sventko v. Kroger, 245 N.W.2d 151 (Mich. 1976); Leach v. Lauhoff Grain, 366 N.E.2d 1145 (Ill. 1977); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1979); Shanholtz b. Monangahela Power Co., 270 S.E.2d 178 (W. Va. 1978); Lally v. Copygraphics, 428 A.2d 1317 (N.J. 1981); Clifford v. Cactus Drilling Corporation, 312 N.W.2d 381 (Mich. 1981);

[39] See Molush v. Orkin Exterminating Co., Inc. 547 F. Aupp. 54 (E.D. Pa. 1982).

[40] See: Nees v. Hocks, 536 P.2d 512 (Or. 1975); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. 1978).

[41] See: Palmateer v. International Harvester Company, 421 N.E.2d 876 (Ill. 1981).

[42] See: Kalman v. Grand Union Company, 443 A.2d 728 (N.J. 1982).

[43] See: Perry v. Hartz, 537 F.Supp. 1387 (S.D. Ind. 1982).

[44] See: Sheets v. Teddys Frosted Foods, 427 A.2d 385 (Conn. 1980).

[45] 246 S.E.2d 270, 276 (1978).

[46] 538 F.Supp. 572 (1982).

[47] 444 N.E.2d 588 (1982).

[48] 721 F.2d 894 (1983).

[49] 721 F.2d 894, 899-900 (1983).

[50] See: O'Sullivan v. Mallon, 390 A2d 149 (N.J. 1978).

[51] See: McNulty v. Borden, Inc., 474 F.Supp. IIII (E.D. (Pa. 1979).

[52] See: Monge v. Beebe Rubber Company, 316 A.2d 549 (N.H. 1974).

[53] See: Fortune v. National Cash Register Company, 364 N.E. 2d 1251 (Mass. 1977).

[54] See: Magnan v. Anaconda Industries, Inc., 429 A.2d 492 (Conn. 1980); Cleary v. American Airlines, 168 Cal. Rptr. 722 (1980).

[55] Magnan v. Anaconda Industries, Inc., 429 A.2d 492 (Conn. 1980).

[56] Fortune v. National Cash Register Company, 364 N.E.2d 1251, 1257 (Mass. 1970).

[57] Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven, Connecticut: Yale University Press, 1921), pp. 24-5.

THE SUPREME COURT AND THE FIRST AMENDMENT; 1983-1984

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The Charge. The Burger Court which has now accommodated four Richard Nixon appointees for more than a decade has at best only moderately fulfilled the conservative charge of strict construction issued by Nixon to counteract the Warren Court era. Indeed the Warren Court legacy may be more aptly characterized as diminished but not deliberately reversed, modified but not substantially overruled. However, recent "law and order" decisions which by reversing the "exclusionary rule" detract from individual rights in the alleged interest of criminal justice may signal a bold departure from previous temperate treatment of the legacy.

As each session of the Court passes into historical review it becomes more apparent that the Court's ambivalence stems from what Constitutional scholars identify as "being adrift," moving from case to case with little regard today for yesterday's precedent. This drift, at least in part, can be attributed to a failure of Warren Burger to provide the leadership, influence, and direction which is expected of a chief Justice who must garner the respect of his colleagues in order to fulfill traditional duties. Burger will be remembered as a craftsman of judicial reform, but this will not translate into a record distinguished by intellectual achievement and influence befitting one who holds the highest judicial office in the land.

The Alignment. A periodic reassessment of the Court alignment lends not only credence to the obvious division within the Court but provides insight into future decisions should the present court make-up remain unchanged. Justice Rehnquist (age 59) joined by Chief Justice (C.J.) Burger (77) and the newest Justice, O'Connor(54), has been fashioning conservative majorities from the swing votes of Justices White(67), Stevens(64), or Powell(76). These same three votes are also coveted by the considerably more liberal-minded Justice Brennan(78) who with Justice Marshall(75) jousts with the more conservative thinkers but has had to do so with the greater challenge of having to win over more swing votes to realize a court majority. However, Justice Blackmun no longer appears among the swing votes since Brennan and Marshall can now look to Blackmun in all but some criminal cases as a third liberal vote (see the First Amendment cases of *Los Angeles v. Vincent, Secretary of State of Maryland v. Munson, Bose v. Consumers Union, and FCC v. League of Women Voters*). Blackmun's alignment with the liberals has been costly to him. Burger, because of his role as C.J. controls the assignment of justices to write opinions; and Blackmun no longer seems to be invited to prepare important opinions as Rehnquist and O'Connor, who are more likely to provide the C.J. with the kind of opinion he prefers, get the nod. What Blackmun has meant to a strengthened liberal hand, however, has been offset by the emergence of Rehnquist as a more effective and successful conservative, made so in part by O'Connor who, now confident in her role, provides him with dependable reinforcement for his views. Although these alignment observations seem pertinent for the present, it must be remembered that the Presidential election of 1984 provides the winner with possibly three appointments to the Court which inevitably will have a profound efect on what happens to the Court, its leadership, and its commitments.

The Record. Although the public likely will identify more closely with this Court's support for home use of video recorders, for expanded TV coverage of college football, and for admitting women into the Jaycees, court-watchers will characterize the 1983-1984 session by the Court's dramatic "law and order" stance and demonstrated preference for the authority of government. By showing a reverence for the wishes of the President down to the needs of local police the Court has sacrificed long recognized individual rights by removing restraints on state power.

Accepting its conservative charge the Court recently has expanded the power of police and prosecutors, relaxed the "exclusionary rule," made the federal courts less accessible for protecting individual rights, diminished the role for affirmative action, and ignored legislative history by empowering the President to ban travel to Cuba. On the other hand this is the same Court which upheld the right to abortion, outlawed sex discrimination in state laws, permitted school busing, and in 1983 recognized for the first time a First Amendment right of access to information.

In 1984 the Court continued an inconsistent and at times unpredictable direction as it supported a new form of prior restraint by upholding a judge who prohibited a newspaper from publishing information obtained by the paper from pretrial proceedings. But during the same session the court handed the media its first favorable libel decision in a decade. However Justices White, Rehnquist, and O'Connor did not favor the media in either case and also remained consistent in their lack of First Amendment support where the Court was divided and for its decision depended primarily on interpreting the First Amendment. Rehnquist voted to restrain expression in every one of these nine cases while White and O'Connor sided with him on eight of the nine. C.J.Burger withheld protection for expression in all of these cases except for the Bose v. Consumer Reports libel decision.

During the recent session, when the Court was confronted with First Amendment issues it limited the expression rights of college faculty members, reinforced the appellate court authority for assuring that the media cannot be held to have libeled without proof that they published with actual malice, removed employees from absolute control over how their union dues are spent for communicative purposes, limited the press freedom to publish, ducked the First Amendment issue in order to support federal rather than state control over advertising, denied states the right to limit the amount of money charities spend for soliciting contributions, relieved public broadcasting of a ban on editorializing, held overnight camping as expressive activity to be subordinate to preserving the attractiveness of a national park, upheld statutory color and size limitations on the photographic reproduction of U.S. currency, and faced with a choice between the clutter of signboards and expression they opted to protect aesthetics.

I. Opinions Rendered(1)

Minnesota State Board for Community Colleges v. Knight, 52 *LW* *4204*

> *College faculty who are not members of an exclusive bargaining unit are not denied First Amendment speech and associational rights when re-strained from influencing their employer's policy making.*

Public employees in Minnesota may bargain collectively over terms and conditions of employment. Public employers may exchange views with their employees on questions related to employment but outside mandatory bargaining. But if the employees who form the bargaining unit have designated an exclusive representative for mandatory bargaining, only the exclusive representative may exchange views with the employer on mandatory subjects. A Federal District Court found that the "meet and confer" provisions of the Minnesota Public Employment Labor Relations Act denied certain college faculty their First and Fourteenth Amendment rights to participate in their employer's making of policy. The District Court granted relief, and the question presented to the U.S. Supreme Court was "whether this restriction on participation in the mandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views"?

Justice O'Connor, who overturned the District Court decision, delivered the opinion for a divided court. O'Connor held that faculty have no constitutional right as members of the public, as state employees, or as college instructors to force state officials acting in an official policy making capacity to listen to their views. Neither the faculty status as public employees nor the nature of the academic setting provides any special constitutional right to be heard by the policy makers. O'Connor continued that despite a tradition of faculty participation in school governance the First Amendment "does not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution."

Justice O'Connor contended that faculty speech and associational rights are not infringed by "meet and confer" sessions being limited to an exclusive representative. "The State has not restrained...[the] freedom to speak on any education-related issue or to associate or not to associate with whom they please...nor has the State attempted to suppress ideas." She concluded that "a person's right to speak is not infringed when government simply ignores that person while listening to others." The state, according to the Court majority, "has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees." Thus the Court found no violation of either the First or Fourteenth Amendments.

Justice Marshall, who concurred in the majority judgment, stressed that the source of any constraint on faculty members to communicate should be considered. When the state legislature instructs college administrators to listen to some faculty but not others and administrators do not decide this for themselves, Marshall urged suspicion.

Since the Public Employment Labor Relations Act bars certain faculty from expressing to college administrators their views on important matters of academic governance, Justice Brennan's dissent found this prohibition contrary to the First Amendment right to be free from compelled association with views not espoused.

Justice Steven's dissent favored discretion by college administrators to accept advice concerning their official conduct rather than favoring the union and restraining a free exchange of ideas by not allowing all ideas to compete on their merits.

For: O'Connor, Burger, White, Blackmun, Rehnquist, Marshall
Dissent: Powell, Brennan, Stevens

Bose Corporation v. Consumers Union, 52 *LW* 4513

> *An appellate court has an obligation to make an independent examination of both law and fact in order to assure that free expression is not intruded upon by mistaking a constitutionally protected false statement for a statement unprotected because it was made with knowledge of the falsity.*

Consumers Union (CU) in its magazine, *Consumer Reports*, critically reviewed several loudspeaker systems including one marketed by the Bose Corporation. Bose brought a product disparagement suit in Federal District Court against CU for the statement that the sound from musical instruments over the Bose speakers tended to "wander about the room." The District Court ruled that Bose as a public figure and under *New York Times v. Sullivan*, 376 U.S. 254 must by clear and convincing evidence show that any false statement made about a Bose speaker was made with "actual malice."

The District Court found for Bose primarily on a CU employee's testimony that the review contained a false statement of fact "because the sound of instruments heard through the speakers tended to wander 'along' the wall between the speakers, rather than 'about' the room" as reported by CU. The CU employee's contention that "about" meant "along" was found not credible, and the statement thus was disparaging. The District Court concluded that based on clear and convincing evidence Bose had sustained the required burden of proving that CU knowingly and with reckless disregard for the truth published a false statement.

The Court of Appeals reviewed the "actual malice" determination of the District Court by conducting a new and independent examination of the record to test whether the governing constitutional rule requiring actual malice had been properly applied. The appeals court did not feel limited in its de novo review by a federal procedure [Rule 52(a)] which provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." The de novo review led to a finding that Bose had not proven "actual malice."

Justice Stevens spoke for the Court majority by holding that the obligation of an appellate court to set aside findings of fact only when "clearly erroneous" under Rule 52(a) is not the standard for review of "actual malice" as governed by *New York Times v. Sullivan*. Appellate judges, according to Stevens, may *independently determine* if the record "establishes actual malice, with convincing clarity" because this appellate judgment becomes necessary to present proscribing expression which cannot be free because of an improper determination of "actual malice" by the trial court. Stevens agreed that Rule 52(a) applies to findings of fact, but this does not preclude an appellate court from correcting errors of law, in particular those which involve a mixed finding of law and fact. Thus, independent appellate review, to include findings of fact, as enunciated in *New York Times v. Sullivan* is required to preserve *constitutionally protected press freedoms*.

In thé Bose Case the CU employee's testimony which constituted proof of falsity as accepted by the trial court was not the same as the required proof of actual malice which properly was found lacking by the appellate court. That the critic attempted unsuccessfully to rationalize that "about" was the same as "along" does not, according to Stevens, "establish that he realized the inaccuracy at the time of publication," a prerequisite to reckless disregard of the truth. Therefore, the CU review of the Bose speakers, in the absence of actual malice, was protected speech within the First Amendment umbrella.

Justice Rehnquist, joined by Justice O'Connor, dissented by refusing to sanction factual second guessing by appellate courts. Rehnquist objected to lessening confidence in the judgment of the lower courts and regarded the majority as thereby providing no greater protection for First Amendment values. He admitted that the issues of "falsity" and "actual malice" were close questions but maintained that the District Court was in the best position to apply the law and serve as the exclusive trier of fact.

For: Stevens, Brennan, Marshall, Blackmun, Powell, Burger
Dissent: White, Rehnquist, O'Connor

Ellis et al. v. Brotherhood...et al. 52 *LW* 4499

> *Union dues, even though used for communicative purposes contrary to the wishes of objecting employee duespayers, do not violate employees' First Amendment rights if the use is related to the expense of negotiating and administering the collective bargaining contract.*

A collective bargaining agreement between a union and an airline required all the airline's clerical employees to join the union or pay fees equal to union dues. The employees objected to the use of their dues or fees for certain union activities and sued the union which agreed that its union shop authorization did not allow spending an objecting employee's money for union political or ideological activities. The union proposed a rebate program which would reimburse objecting employees for the contested expenditures, but the employees disagreed about the adequacy of the rebate scheme and challenged the legality of other union expenses being charged to the employees.

The trial court held that the rebate program adequately protected employees' rights but the additionally challenged expenditures were unlawful because they did not ultimately benefit collective-bargaining and thus dues from objecting employees could not be collected and applied toward the challenged activities. The appeals court upheld the rebate plan but allowed the expenditure of objecting employees dues and fees for the other challenged expenditures such as support for union magazine publications, social activities, and union conventions.

The Supreme Court, in an opinion by Justice White reflecting the sentiment of a nearly unanimous Court, reversed the lower court support of the rebate scheme but affirmed the propriety of expenditures for the challenged activities. White found the rebate method of refunding dues expended for improper and objectionable purposes to be unacceptable. "Given the existence of acceptable alternatives, such as advance rduction of dues, a union cannot be allowed, on the ground of administrative convenience, to commit dissenter's funds to improper uses even temporarily."

With regard to the right to apply dues to defray the costs of national conventions where policy is formulated, to hold union related social activities, and to publish a monthly magazine, the Court majority upheld union rights. The general expenses of a union to negotiate and administer the contract and settle grievances within the bargaining unit were held necessary and justifiable despite employee objections. One such legitimate expense was the monthly magazine which reported about activities for which the union could charge even objecting employees. Only if the union could not spend dissenter's funds for a particular activity could it fail to justify spending their dues for writing about that activity.

White concluded that the "interference with First Amendment rights resulting from allowing the union shop is justified by the government interest in industrial peace." Forced contributions to union social affairs did not increase the infringement of any First Amendment rights. Although union publications and conventions have direct communicative content, White found no First Amendment infringement not justified by the governmental interest underlying the union shop arrangement.

For: White, Burger, Brennan, Marshall, Blackmun, Rehnquist,
Stevens, O'Connor

Dissent: Powell

Seattle Times et al. v. Rhinehart et al., 52 LW 4612

> Litigants in a civil proceeding do not have a First Amendment right to publish in advance of trial information gained through the pretrial discovery process. Where the governmental interest outweighs

any claimed right to expression, prior restraint of the expression does not violate the First Amendment.

Action was brought for defamation and privacy invasion resulting from several stories published by the *Seattle Times* about Keith Rhinehart and the Aquarian Foundation of which Rhinehart is the spiritual leader. During discovery proceedings prior to the trial, the respondents, Rhinehart and the Aquarian Foundation, were ordered by the trial court to produce information about the Foundation donors and members. Pursuant to the respondent's claim that public disclosure of such information would affect Foundation membership and subject its members to harassment and reprisals, the Court ordered the *Seattle Times* not to publish, disseminate, or use the information "in any way except where necessary to prepare for and try the case." The protective order restrained publication only of information obtained during the discovery process.

The state supreme court upheld both the order to produce the information and the order to protect it from disclosure. The U.S. Supreme Court granted certiorari to resolve whether a newspaper that is a party to a civil lawsuit may be prohibited by a judge from publishing information the paper obtains in pretrial hearings.

Justice Powell delivered the opinion for a unanimous court which held pretrial records to be protected by First Amendment guarantees of free speech and press to a far lesser extent than other forms of expression.

Powell found it "necessary to consider whether the practice in question furthers an important or substantial government interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms is no greater than necessary or essential to the protection of the particular governmental interest involved." Powell held that a litigant has no First Amendment right of access to information "made available only for purposes of trying hissuit." A restraint placed on the use of information obtained through the discovery process was not a restriction on a "traditionally public source of information." Powell supported the propriety of the protective order by commenting on the potential for abuse of the discovery process. He noted that the opportunity for litigants to obtain information which if released could be damaging to reputations and privacy justified the protective order issued by the trial court. The importance of a discovery process, which induces litigants to be uninhibited about information they produce, requires substantial latitude, Powell concluded, for the court to issue protective orders. Thus the respondents' interest in privacy and freedom from abuse by the publication of volunteered data were found sufficient to overcome any protections afforded free expression by the First Amendment. The order forbidding the publication of pretrial information was found not to be the "kind of classic prior-restraint that requires exacting First Amendment scrutiny."

For: unanimous

Los Angeles City Council v. Taxpayers for Vincent, 52 *LW* 4594

Freedom of expression guarantees are not abridged by a city ordinance which prohibits posting signs on public property so that visual clutter can be eliminated.

Supporters of a candidate for election to the Los Angeles City Council contracted with a company to make and post signs promoting Roland Vincent's candidacy for city council. Subsequently cardboard signs bearing the candidate's name were attached to utility poles at various locations in violation of the Los Angeles Municipal Code which prohibits posting signs on public property. As a result city employees removed these and other posters and objects prohibited by the ordinance.

Taxpayers for Vincent, alleging abridgement of their freedom of speech, filed suit against the city in Federal District Court. The District Court found the ordinance constitutional and granted the city's motion for summary judgment. An appellate court, however, held the ordinance unconstitutional because "significant First Amendment interests were involved and the City had not justified its total ban on all signs on the basis of its asserted interest in preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property."

The Supreme Court in a 6-3 opinion delivered by Justice Stevens reversed the appellate court and found the ordinance not unconstitutional in its denial of this political advertising. Justices Brennan, Marshall, and Blackmun dissented claiming freedom of speech was abridged within the meaning of the First Amendment.

Justice Stevens found the First Amendment prohibition of government regulation in favor of some viewpoints at the expense of others to be inapplicable since the ordinance is not concerned with sign content, is applied evenly to all who post signs, and is concerned with improving the city's appearance rather than suppressing ideas. By banning posted signs on public property the city acted within its constitutional power to eliminate visual clutter.

Stevens recognized the District Court's findings that ample alternative modes of communication remain. The ordinance did not affect the right to speak and distribute literature where sign posting was prohibited.

Stevens rejected the arguments that the ordinance restricts use of a public forum entitled to special First Amendment protection and that the city could or should have favored political expression by writing an ordinance with a less severe effect on expressive activity. Public property, Stevens contended, which is not by tradition or designation intended as a forum for public communication may be set aside by the government for an intended purpose, be it communicative or not. The controlling consideration remains that there be no suppression of expression because public officials oppose its substance. Stevens did not favor creating an exception for political expression and thereby affecting less than all expressive activity because this risks constitutionally forbidden content discrimination.

The majority opinion concluded by accepting the city's position that the city may properly decide that the aesthetic interest in avoiding visual clutter justifies removal of all signs creating or increasing that clutter.

Justice Brennan's dissent stressed that aesthetic regulation which restricts speech must be no more restrictive of speech than necessary, and the city did not demonstrate that alternatives to a total ban on signs were sufficiently explored. Brennan found the sweep of the ordinance to be so broad that an important medium of political expression could not be exercised and this violated First Amendment protection for expression.

For: Stevens, Burger, White Powell, Rehnquist, O'Connor
Dissent: Marshall, Brennan, Blackmun

Capital Cities Cable, Inc. v. Crisp, 52 *LW* 4803

> *A state ban on alcoholic beverage advertising does not apply to cable television systems which retransmit out-of-state signals containing the banned advertising.*

Operators of cable television systems in Oklahoma were warned that they would be criminally prosecuted if they retransmitted out-of-state signals containing wine advertisements. The threat of prosecution was predicated on a finding by the Oklahoma Attorney General that the State prohibition against advertising alcoholic beverages was applicable to cable television. The operators sued in Federal District Court for declaratory and injunctive relief because, they claimed, the advertising ban violated various provisions of the Constitution including the First Amendment. The District Court found the advertising ban to be an unconstitutional restriction on the operator's right to engage in commercial speech. The Court of Appeals, which reversed the District Court, agreed that the wine commercials were protected by the First Amendment but the state ban was a valid restriction on commercial speech.

The Supreme Court restored the holding of the District Court by finding for the operators. However, in granting certiorari the Court ordered the parties to the suit, in addition to the question concerning violation of commercial speech rights, to address the question "whether the state's regulation of liquor advertising as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting." Justice Brennan, who delivered the opinion for a unanimous court, held that this state regulation was pre-empted by federal law and any First Amendment question need not be considered. Once the First Amendment issue was set aside Brennan's opinion exclusively became a rebuff of Oklahoma for interfering with a regulatory area the Federal Communications Commission (FCC) has explicitly and permissibly pre-empted for twenty years. Oklahoma's ban conflicted with various FCC regulations including those which require cable television system operators to carry signals from broadcast stations in other states and to carry them in full, including any commercial advertisements.

The Court resolved any conflict of laws in favor of those federal regulations necessary to ensure that the FCC can fulfill its statutory responsibilities.

For: unanimous

Secretary of State of Maryland v. Munson, 52 LW 4875

> A statute prohibiting a charitable fund-raising organization from solicitation if they pay expenses of more than 25% of the amount raised unconstitutionally abridges free speech and any waiver of the limitation if it prevents raising contributions does not save the statute.

The Joseph H. Munson Company, a professional fund raiser, brought suit in a Maryland Circuit Court alleging that it regularly charges in excess of 25% for its services; and a Maryland statute prohibiting fund raising where more than 25% of the amount raised goes for expenses, which includes the cost of information, dissemination, discussion, and advocacy, violates First Amendment free speech rights.

The Maryland Court of Appeals reversed two lower courts and found the statute unconstitutional despite a provision in the statute which waived the 25% limitation where it effectively prevents fund raising.

Justice Blackmun delivered the opinion of a divided Supreme Court. Blackmun found the statute to be unconstitutionally overbroad and regardless of the waiver provision the percentage restriction improperly limited protected First Amendment solicitation activity. The major defect in the statute, he claimed, was that all its applications are premised on the mistaken notion that high solicitation costs are a measure of fraud. Where high solicitation and administration costs result from information dissemination, discussion, and advocacy of public issues, rather than fraud, charitable organizations wrongfully are barred from carrying on protected First Amendment activities. The statute fails to distinguish high fund raising costs not due to protected activities from high costs due to protected First Amendment activities.

Blackmun concluded that the statutory means to accomplish the state's objectives, such as preventing fraud, were too imprecise because in all of its applications the statute unnecessarily risks chilling free speech.

Justice Rehnquist's dissent chided the Court majority for misunderstanding the primary purpose and effect of the statute and then speculating about how it might be improperly applied.

For: Blackmun, Brennan, White, Marshall, Stevens
Dissent: Rehnquist, Burger, Powell, O'Connor

Clark v. Community for Creative Non-Violence, 52 LW 4986

> A regulation prohibiting camping in certain parks does not infringe on the free speech rights of demonstrators who sleep in a part to call attention to the plight of the homeless.

The National Park Service granted the Community for Creative Non-Violence (CCNV) permission to demonstrate in Lafayette Park and the Mall, national parks in Washington, D. C. The demonstration was organized to attract attention to the plight of the homeless, and the permit authorized the erection of two tent cities. However, a request that demonstrators be allowed to sleep in their tents was denied by the Park Service because camping, which includes sleeping activity, was not approved in these two parks. CCNV filed suit in Federal District Court claiming that regulations which prevent sleeping in tents violate rights of protected expression. The District Court granted summary judgment for the Park Service and the Court of Appeals reversed for CCNV.

Justice White writing for the majority of a divided Court found the regulation forbidding sleeping satisfies requirements for reasonable time, place, and manner restrictions on expression even if the overnight sleeping is expressive conduct protected to some extent by the First Amendment. White upheld the validity of the regulation because it is neutral about message content, does not preclude other alternatives for communicating the message intended, and prohibits camping which is inimical to maintaining attractive parks for millions of people to see and enjoy.

White concluded that the regulation's validity should not be measured solely by reference to the demonstration at hand. He held the prohibition against camping to be a valid regulation of expressive conduct because of a substantial Government interest, unrelated to the suppression of expression, to limit "wear and tear on park properties" by disallowing sleeping.

Justice Marshall's dissent lamented that "government agencies by their very nature are driven to overregulate public forums' to the detriment of First Amendment rights" and that the regulation's apparent neutrality about expressive content is no guarantee against the use of the regulation to restrict unpopular ideas or a mode of expression.

For: White, Burger, Blackmun, Powell, Rehnquist, Stevens, O'Connor
Dissent: Brennan, Marshall

FCC v. League of Women Voters of California, 52 LW 5008

The First Amendment is violated by the Public Broadcasting Act ban on editorializing by any noncommercial educational broadcasting station that receives Federal funding.

The Corporation for Public Broadcasting was established by the Public Broadcasting Act of 1967 as a nonprofit corporation to disburse federal funds to noncommercial television and radio stations in support of station operation and educational programming. A condition under the Act, sect. 399, was, however, that no station receiving a grant could "engage in editorializing."

The Pacifica Foundation, an operator of noncommercial educational broadcasting stations, along with the League of Women Voters, a listener, and a viewer of public broadcasting brought suit in Federal District Court to challenge the ban on editorializing. The District Court found the ban in violation of the First Amendment and granted summary judgment.

Justice Brennan delivered the opinion for a divided Court and affirmed the District Court by lifting the ban on editorializing. Brennan reasoned that Congress has the power to assure that the public receives a balanced presentation of information and views on issues of public importance. Section 399, however, singles out noncommercial broadcasters and prevents them from addressing matters of public importance. This restriction aimed at the expression of editorial opinion goes to the heart of what the First Amendment is intended to protect.

Section 399, Brennan continued, exceeds what is necessary "to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government." In perhaps the most telling argument against the ban on editorializing, Brennan pointed out that section 399 does not even prevent the presentation of partisan views on controversial matters but "merely bans a station from specifically labeling such issues as its own or those of its management."

Justice Brennan's conclusion stressed that the Court does not deny either Congress or the FCC power to regulate the content, timing, or character of speech by noncommercial educational broadcasting stations, but the Court does find that the ban on editorializing did not fulfill the interests advanced by section 399 sufficiently to warrant abridgement of important protected journalistic freedom.

Justice Rehnquist's dissent took the view that Congress concluded that taxpayers whose monies fund the grants for public broadcasting "would prefer not to see the management of public stations engage in editorializing or the endorsing or opposing of political candidates." Nothing in the First Amendment, according to Rehnquist, makes it unconstitutional for Congress to enact a ban on editorializing as a rational and neutral exercise of its spending powers.

For: Brennan, Marshall, Blackmun, Powell, O'Connor
Dissent: White, Rehnquist, Burger, Stevens

Regan v. Time, Inc., 52 LW 5084

> Statutory limitations on the size and color of photographic reproductions of U.S. current are permissible regulations on the "manner" of expression but discrimination on the basis of the content of that expression violates the First Amendment.

Although 18 U.S.C., section 474 bans the photographic reproduction of currency, section 504 permits the creation and use of such photographs "for philatelic, numismatic, educational, historical, or newsworthy purposes," if the illustrations are in black and white and are undersized or oversized, and if the negatives or plates used in making the illustrations are destroyed after final use. Time, Inc., published a color reproduction of U.S. currency on the cover of Sports Illustrated and after being warned by the Secret Service that this violated section 504 brought an action in Federal District Court to have both statutes declared unconstitutional. The District Court found in favor of Time, Inc. and held that the statutes violated the First Amendment.

Justice White delivered an opinion for a divided Court although various alignments on the issues actually resulted in four separate written opinions. First, White held the purpose requirement of section 504 to be unconstitutional and Burger, Brennan, Marshall, Rehnquist, and O'Connor joined with him in this view. The purpose requirement could not be sustained as a valid time, place, and manner regulation because a determination of the newsworthiness or educational value of a photograph discriminates on the basis of message content, and this violates the First Amendment.

Second, White was joined by Burger, Rehnquist, O'Connor, and Stevens in reversing the District Court by holding section 504 valid with respect to color and size limitation even though section 504 contained an invalid purpose requirement. The unconstitutional "purpose" provision was severed from the statute saving the remainder of the statute's regulatory scheme from being invalid.

White held the size and color requirements to be valid as "manner" regulations which do not judge content, which enable Time, Inc. to express any view on any subject, and which allow illustrations of currency to represent these views. With the "purpose" requirement of section 504 removed, the Government by restricting only the manner in which illustrations of currency can be presented does not need to evaluate the nature of a message and thereby commit an unconstitutional act. By upholding the size and color requirements White concluded that the Government's interest in preventing counterfeiting effectively is preserved.

Justice Stevens agreed with the views of the Court majority except for his insistence that the "purpose" requirement also was constitutional.

Justice Brennan joined by Justice Marshall preferred to affirm the District Court because the scheme Congress adopted "is plainly unconstitutional." Brennan found both sections work together to ban "a substantial amount of legitimate expression posing virtually no risk of counterfeiting." Because of extensive and detailed regulation of counterfeiting found elsewhere in Title 18 of the U.S. Code, Brennan contended that the Government interest in preserving the integrity of the currency through sections 474 and 504 was only marginally served.

Justice Powell joined by Justice Blackmun took the position that if the "purposes" clause is unconstitutional, as it was properly found to be, then the entire statute is invalid. The rest of section 504 would never have been enacted by Congress without the "purposes" clause in Powell's opinion.

For: White, Burger, Rehnquist, O'Connor, Stevens (dissented in part)
Dissent: Brennan, Marshall, Powell, Blackmun (all concurred in part)

II. CASES DISPOSED WITHOUT HEARINGS

(the Supreme Court took action which in each of the following cases resulted in allowing the holding of the lower court to prevail except in those instances which are noted otherwise)

ADVERTISING

Issue: Is a Mississippi statute constitutional when it prohibits the advertisement of liquor even in counties in which the sale of liquor is legal or is this an unconstitutional restraint on commercial speech which deprives petitioners of their First Amendment right to freedom of speech? Certiorari denied. Dunigan v. City of Oxford, Miss., 52 LW 3670; 718 F2d 738.

Lower court: A state statute interpreted to make coupon advertising of prescription drugs an unlawful activity does not violate the First Amendment, "since government may ban commercial speech related to illegal activity." Issues: Is coupon advertising of prescription drugs protected by the First Amendment as commercial free speech? Did the lower court err in finding the coupon advertising an unlawful activity under state law and therefore exempt from First Amendment protection otherwise accorded to commercial speech? Appeal dismissed. Consumer Value Stores v. New Jersey Board of Pharmacy, 52 LW 3670.

Issue: "May a township, consistent with the First and Fourteenth Amendments, eliminate and totally prohibit all outdoor advertising within township limits"? Appeal dismissed. Bell v. Township of Eagleswood, 52 LW 3704.

ASSEMBLY

Lower court: The First and Fourth Amendments do not preclude the issuance of warrants authorizing the seizure of evidence of membership in an organization. However, warrants issued to police for the seizure of membership evidence in a Hell's Angels motorcycle club were invalid because they lacked specificity about which evidence was to be seized. Nevertheless, the evidence seized was admissible under an exception to the exclusionary rule. Issue: Is a search warrant, not per se illegal, which authorizes the seizure of evidence of membership in an organization ever consistent with First Amendment assembly rights? Certiorari denied. Apker v. U.S., 52 LW 3553; 705 F2d 293.

CITIES

Lower court: A municipal ordinance which prohibited operation of "any mechanical or electronic amusement device...[except for] private in-home use..." was held not to violate the First Amendment since sufficient communicative and expressive elements were not present. Issue: Is an ordinance overbroad and in violation of First Amendment protections if it prohibits commercial operation of all but a few "automatic amusement devices" and includes video games within the ban? If the ordinance exempts private in-home use and does not prohibit any other form of group entertainment or amusement, is the ordinance unconstitutional? Appeal dismissed. Marshall Family Skateland, Inc. v. Town of Marshfield, 52 LW 3401; 450 NE2d 605.

Issues: When a municipal official, through private channels of communication, urges department stores not to carry a board game which satirizes public assistance programs, are the First Amendment rights of the game's creators violated? Are the

First Amendment rights of others violated by a public official who seeks to prevent the publication of views on highly controversial public issues which may touch upon and contradict the views held by the official's agency? Certiorari denied. *Hammerhead Enterprises, Inc. v. Brezenoff,* 52 *LW* 3193.

Lower court: The public interest is best served by allowing the termination of a city employee who tipped off a local newspaper about a city auditor who concealed his wrongdoings. *Issues:* Can the discharge of a public employee who exercised his First Amendment rights be justified without any showing that he interfered with the efficiency of public services performed by him or his agency? Should a state court involved in the discharge of a public employee for the exercise of speech conduct be required to show that the discharge was made with proper respect for the employee's First Amendment rights? Certiorari denied. *Lesiak v. Ferguson,* 52 *LW* 3051.

Lower court: There was a violation of First Amendment rights for discharging black police officers who publicly removed Amrican flags from their uniforms to protest perceived discrimination. *Issues:* Is there a sufficient municipal interest in prescribing American flag emblems to be worn on a police officer's uniform or is the requirement unconstitutional? Is the removal of the flag emblem, as a protest for the treatment of the officers by their superiors, a form of symbolic spech protected by the First Amendment? Certiorari denied. *City of Columbus v. Leonard,* 52 *LW* 3562; 705 *F2d* 1299.

CONSTITUTIONAL LAW

Issue: Does the Privacy Act, 5 USC 522a(e)(7), "permit a federal agency to maintain, as part of an 'intelligence' investigation unrelated to any unlawful activity, records describing a person's exercise of First Amendment rights"? Certiorari denied. *Jabara v. Webster,* 52 *LW* 3109; 691 *F2d* 272.

CONTRACTS

Issue: Is it consistent with the First Amendment for an appeals court to deny an author a breach-of-contract judgment against a publisher solely because of the publisher's distaste for the style and political content of the author's work? Certiorari denied. *Zelig v. Prentice-Hall, Inc.,* 52 *LW* 3738; 717 *F2d* 671.

CORPORATIONS

Issues: Does the Federal Election Campaign Act's ban on corporate political expenditures in federal elections violate the First Amendment? Since Congress has authorized similar contributions to partnerships, other business and non-business organizations and individuals, is this ban overbroad and discriminatory when applied to federal elections? Certiorari denied? *Athens Lumber Co., Inc. v. Federal Election Commission,* 52 *LW* 3691.

EMPLOYEES

Lower court: There was sufficient evidence that a discharged Army Corps of Engineers employee, through argumentative discussions with his supervisors, was disruptive and this threatened performance of his duties. Issue: For a civil service employee who claims his discharge violated his First Amendment rights, should the government have to justify constitutionally the dismissal by a preponderance of the evidence? Certiorari denied. Nathanson v. U.S., 52 LW 3355. 702 F2d 162.

Issue: Was a memorandum which reminded an employee to follow the "chain of command" merely a valid time, place, and manner restriction on employee's speech, as determined by the lower court, or did this infringe on his First Amendment rights? Certiorari denied. Boyd v. Lehman, 52 LW 3496; 709 F2d 684.

MASS MEDIA

Lower court: The First Amendment is not violated by the conviction of journalists who without authorization attempted to cover an antinuclear demonstration at the site of a nuclear power plant which had been closed to both the press and the public. Issues: Is the press protected by the First Amendment from trespass charges when reporters peacefully enter a nuclear construction site for the sole purpose of reporting a bona fide news event involving demonstrators who had already entered the same property? Does the First Amendment protect the press when their access is denied by state authorities in an attempt to control and limit press coverage of an event? Certiorari denied. Stahl v. Oklahoma, 52 LW 3300.

Lower court: A judge does not abuse his discretion when on the discharge of jurors in a criminal case he orders that no person may make repeated requests for interviews with jurors who do not desire to be interviewed and no interviewer may ask any juror how another juror voted. Issues: Is there prior restraint in violation of the First Amendment when a federal judge by court order denies to the public and the press access to information about the judicial process? If there is not threat to the administration of justice, is such an order violative of the First Amendment? Appeal dismissed. El Paso Times v. U.S. District Court for the Western District of Texas, 52 LW 3469.

Issue: Does a trial judge violate the First Amendment in a criminal prosecution with a sequestered jury when he indefinitely prohibits the media from publishing the identity of the jurors and when he restricts the public and press access to trial exhibits which have been admitted into evidence? Judgment vacated. Capital Cities Media, Inc. v. Toole, 52 LW 3407.

Issue: Is it error for a trial court to quash a subpoena of documents on First Amendment grounds when the defendant seeks a news reporter's materials without showing the information to be material, relevant, necessary to the defense, and unobtainable from other sources? Certiorari denied. Burke v. U.S., 52 LW 3098; 700 F2d 70.

OBSCENITY

ISSUE: Is a Maryland statute constitutional which makes it a crime to advertise the human body depicting sadomasochistic abuse, sexual conduct, or sexual excitement or does the proscription of this as obscenity interfere with protected expression? Certiorari denied. Randall Book Corp. v. Maryland, 52 LW 3097; 452 A2d 187.

Lower court: A federal district court found the movie Caligula not to be obscene under federal or state law. Issue: Can a federal district court resolve under state law the obscenity issue about a sexually explicit motion picture which is not protected speech as a matter of federal constitutional law? Certiorari denied. McAuliffe v. Penthouse International, Ltd., 52 LW 3671; 717 F2d 517.

Issue: May law enforcement officers under the First and Fourth Amendments use a search warrant to seize magazines, films, and videotapes that have not been subjected to judicial scrutiny by descriptive affidavit or actual review? Certiorari denied. Sequoia Books, Inc. v. McDonald, 52 LW 3809.

Issues: Is a Kentucky obscenity statute unconstitutional if it presumes that press materials which depict or describe sexual conduct are patently offensive? Is such a statute unconstitutionally applied when the geographical community by whose standards press materials are to be judged is confined to greater Cincinnati and northern Kentucky? Does a statute which includes a "highly prejudicial and inflammatory definition of the word "prurient" become unconstitutional as applied to defendants? Certiorari denied. Brown Bear, Inc. v. Kentucky, 52 LW 3795.

SCHOOLS

Lower court: A nontenured public school teacher was not protected by the First Amendment from retaliatory dismissal. Her disputes with the curriculum coordinator over a prescribed reading program and with the principal about his evaluation of her constituted expression about internal school affairs rather than statements about general public concern. The teacher's statements were found to be insufficient for First Amendment protection. Issue: Were constitutional rights adequately protected? Certiorari denied. Provoda v. Belen Board of Education, 52 LW 3316.

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(1) Official U.S. case citations for the 1983-1984 Supreme Court term do not appear because they are assigned subsequent to the preparation of this review.

THE FIRST AMENDMENT ISSUE OF OBSCENITY: A PHENOMENOLOGICAL ANALYSIS

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> Probably no free speech controversies in the United States stimulate the flow of as much adrenalin as those surrounding the communication of words and pictures that allegedly are harmful to the moral and psychological well-being of people who hear and see them.[1]
>
> Franklin Haiman

Banning books in schools and libraries, censoring theatrical productions, prohibiting the teaching of sex education courses in schools throughout the United States or restricting the distribution of allegedly obscene movie films are but some of the issues surrounding the controversy of obscenity. The significance of this controversy and its relationship to freedom of speech are obvious to most who believe in the principle of "free exchange of views in the marketplace of ideas." Equally obvious is the fact that censorship inhibits this "marketplace." And, as long as obscenity continues to be viewed by the Supreme Court as speech unprotected by the First Amendment, such speech or speech-like activities are likely to be challenged by individuals who wish to protect themselves or others from allegedly obscene material.

But what is obscenity? What is obscene to one individual may not be to another individual. "Some like Chopin," explains former Supreme Court Justice William O. Douglas, "others like 'rock and roll'....Man was not made in a fixed mould....Each of us is a very temporary transient with likes and dislikes that cover the spectrum."[2] Or, as former Supreme Justice Potter Stewart writes, "A book worthless to me may convey value to my neighbor."[3] Personal taste and values, then, dictate one's view of what obscenity is or is not. But legal definitions and laws and not one's personal taste guide the judicial process on such matters. Unfortunately, similar to the problem of lack of consensus regarding the meaning of obscenity based upon one's personal tastes or values, there is also no clear consensus for the legal meaning of the terms. This problem becomes quite evident, for example, with the legal definition of the term obscenity found in Black's Law Dictionary. It defines obscenity as "...the character or quality of being obscene: conduct tending to corrupt the public morals by its indecency or lewdness."[4] Such a definition is so broad in scope as to render it virtually useless. As Stewart laments, "the Court may be trying to define...[the] indefinable."[5] Echoing similar sentiments, the Ohio State court explains:

> Obscenity is not a legal term. It cannot be defined so that it will mean the same to all people, all the time everywhere. Obscenity is very much a figment of the imagination--an indefinable something in the minds of some and not in the minds of the people of every climate and country, not the same today that it was yesterday and will be tomorrow.[6]

Definition alone is not necessarily the key problem associated with the term obscenity. A more significant problem, argues Roger Haney, rests with the "adequacy and consistency of the criteria offered for evaluating the usefulness of the definition."[7] Too often, the application of criteria for judging obscenity leads to "a morass of conflicting confusion."[8] Similar feelings are illuminated in former Supreme Court Justice Hugo Black's dissenting opinion in Ginsburg v. U.S. Explains Black: "In one community or in one courthouse a matter would be condemned as obscene under this so-called criterion [for judging obscenity] but in another community, maybe only a few miles away, or in another courthouse in the same community, the material could be given a clean bill of health."[9] With no uniform standard for judging allegedly obscene acts, is the Court applying an arbitrary standard as suggested by Justice Stewart, who claimed that he could not define obscenity but knew it when he saw it?[10]

In administering judgments about the obscene, the Supreme Court interprets First Amendment mandates on obscenity. Yet, as previously pointed out, its own interpretation of obscenity is unclear. One approach for clarifying the court's position is through a phenomenological methodology. A phenomenological analysis of the Court's interpretation of First Amendment mandates on obscenity specifies an ontological structure and thus a meaning of the Court's interpretation. A clarification of what defines the Court's stance on obscenity along with the Court's criteria for judging obscenity is in turn possible. To aid in this endeavor, the present paper uses a phenomenological analysis of the Miller v. California case which, viewed by the Court, attempts to offer "standards more concrete than those in the past" on what it legally perceives as constituting obscenity.[11]

Phenomenology: A Methodological Perspective

Phenomenology is the study of essences. In contemporary phenomenology, what is essential is always a function of existence: the essential is existential.[12] Here, existence is the ontological condition of all epistemological and axiological considerations. All meaning is an ontological structure.

Phenomenology identifies existence as a process of communication. Meaning, or essence, is in turn an ontological structure implicit in communication. Meaning or essence is given in an interpersonal relationship where reciprocal (intersubjective) and historical experience constitutes a simultaneous social value (rhetoric) and individual value (ethic). The juncture between social and individual value is the relationship between *langue* (speech as social value) and *parole* (speaking as individual value) in discourse. Here, the natural, cultural, social, and personal worlds are a perception by individual thought and action (individual value) but are also necessarily an expression of social convention (social value). In short, phenomenology is a transactional model of communication. It is within the dynamic between social value and individual value in communication that freedom of speech lies.

Phenomenology explicates the ontological structure of phenomena and thus their meaning or essence. To discover the meaning of phenomena, the phenomenologist conducts a "return to the things themselves" prior to any abstract conceptualization or schematization. Existence is primary in the discovery of meaning.

A discovery of an ontological structure of the Court's interpretation of obscenity provides a number of possibilities for objects of analysis. Any Court act of judgment as to what is or is not obscene manifests an ontological structure and hence a meaning of the Court's definition of obscenity. The act is an instance, or an example, of an ontological structure of the Court's interpretation. *Any* case or set of cases as instances, or examples, of the Court's perspective are possible objects of analysis. But, the *Miller* case in particular offers perhaps the most complete set of contemporary guidelines on what legally constitutes obscenity. Although other cases since *Miller* in 1973 further define obscenity, the *Miller* case remains a foundation of the legal definition of obscenity. The *Miller* case is significant in light of the framework it provides for assessing obscenity. The present paper thus takes the *Miller* case as its object of phenomenological analysis. The case is taken as a specific instance, or example, which can illuminate the general meaning of the Court's perspective on obscenity.

The *Miller* case rejects an earlier constitutional standard that "material must be utterly without redeeming social value" as found in *Memoirs v. Massachusetts*.[13] The *Miller* case, however, does add to the list of criteria for judging obscenity the test for "patently offensive material." Finally, the case clarifies contemporary community standards as local and not natinal standards, as defined earlier in *Jacobellis v. Ohio*.[14] The *Miller* case states the following three criteria for judging obscenity: 1) the average person, applying contemporary community standards, would find that a work taken as a whole appeals to prurient interest; 2) the work is patently offensive conduct in violation of state laws; and 3) the work lacks serious literary, artistic, scientific or political value.[15] Community standards are the standards which prevail in the local community forum.

Again, the point of the present analysis is not to delineate the details of the *Miller* case, or even explicitly to address the case's arguments. The *Miller* case is merely a means to the broader, more general purpose of defining the Court's meaning of obscenity. The phenomenological assumption is made here that, since the case is an instance of the ontological structure and in turn meaning of the Court's interpretation of obscenity, examining the case can reveal the broader, underlying meaning of the Court's perspective on obscenity.

A Phenomenological Interpretation of the Miller Case

Obscenity as a Social Value

A phenomenological reading of the *Miller* case reveals that the Supreme Court's interpretation of the First Amendment creates obscenity as a *social value*. The Court's perspective is that acts which constitute obscenity manifest a social context. Obscenity is thus a social value. This perception is evident in the tenets of the *Miller* case. For example, the concept of "contemporary community standards" which is decided in "forum community," whether local as in the *Miller* case or national as in the *Jacobellis* case, signifies a value upon which a particular group agrees. The standards are a process of consensus at a particular time that creates a social value as social convention.

The Court's contention that the work which is obscene is patently offensive conduct in violation of state laws also constitutes obscenity as social value. The Court provides examples for defining regulations (e.g., "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated"[16]). What is patently offensive conduct in violation of state laws is what a particular group decides it to be. Their view becomes an institutionalized statement of contemporary standards by a forum community. This law becomes a formal group consensus. As such, it is a formalized social value.

The Court further mandates that an act, whether film, print or personal in nature, is obscene if it lacks serious literary, artistic, scientific or political value. This mandate is also a statement that what is obscene is a function of judgments made according to a certain social value. If a work is judged as obscene according to contemporary community standards, then what is not obscene, i.e., what has legitimate social value, is a matter of what a particular community decides. Seriousness, as well as the notions of the literary, artistic, scientific or political, is consensual and as such social value.

The *Miller* case also posits as a test for obscenity the existence of an average person who applies contemporary standards and finds a work as a whole appealing to prurient interest. The standards for these judgments are social determinations of what constitutes sex as patently offensive conduct rather than serious literary, artistic, scientific or political value. Sex itself, then, is a social value. The nature and function of sex is what a particular group decides it is in the consensual process of community forum, whether national or local. For example, what is sexually offensive in one time and place is not in another.

The test of an average person applying contemporary community standards and finding a work appealing to prurient interest further defines obscenity as social value. An "average" person is a ratio of particular selves existent in a particular group. It is a consensus on what represents a particular group. An average person is a value generated in a social process, i.e., an average person is a social value. Moreover, the Court maintains that the average person must find the work as a whole, not just part of it, appealing to prurient interest. This qualification is itself a social value: it is what a paradigm self determines to be a whole of a work.

Obscenity as an Individual Value

A phenomenological analysis of the *Miller* case further defines obscenity as an *individual value*. An essential part of the Court's interpretation is that obscenity manifests the individual experience implicit in thought and action. Obscenity is an individual value; it is a function of thought according to a particular standard of interpretation just as it is a function of action according to a particular standard of interpretation. What is obscene stems from, in phenomenological terms, individual perception and expression.

From a phenomenological perspective, the theoretical person experiences a work as obscene in perception. She or he takes the work in a particular way: she or he adopts a particular stance toward it. Experience by the average person of the obscene then becomes an individual value.

Expression as an individual value of what is obscene is also an essential part of the Court's interpretation. This is implicit in the Miller position. The argument here is as follows: a work is an action. An obscene work is so by action. In action, the person takes a stance toward the world in a movement on that world. She or he makes the world her or his own in the experiencing of it and changes it in doing so. This means that in phenomenological terms she or he expresses the world and creates it as an individual value. Obscenity, too, is an expression of a world in the experience implicit in a work as action. Its expression likewise constitutes it as an individual value.

The Court's conception of obscenity thus spans two standards of judgment. It entails both social and individual value. First, in terms of social value, obscenity is by Court definition a legal restriction on speech. If a person formulates a work which supercedes the law, she or he is liable for a social sanction formally embodied in the boundaries set by the law and its concurrent penalties for violation. Individual speech is restricted so that it does not offend community sensibilities.

Second, the Court's interpretation of First Amendment mandates constitutes obscenity as an individual value. Acts which are not considered obscene are protected expressions made by individuals. They are allowed stances toward the world implicit in actions in the world. However, what is obscene is not strictly a matter of individual expression in action. As previously shown, it is also a function of individual perception in thought. Court judgments themselves become particular stances toward or ways of seeing a social action.

Yet, Court judgments are themselves a social value. The decisions are consensual. They are the process of dialogue between the individual justices' perspectives to negotiate a common perspective. Obscenity as the individual value present in each of the justices' perspectives is implicitly a social value, which the Court's joint deliberation creates. Supreme Court decisions also constitute obscenity as general social value. Their decisions draw on an already present system of general social values as a context for decision-making. For example, decisions as to what is obscene may be left to local governments--a process which reflects the United States' social value of democracy. Obscenity as an individual value is simultaneously a social value. Conversely, obscenity as a social value is simultaneously an individual value; the Court's consensual constitution of obscenity as a social value is grounded in each of the individual justices' perspectives as an individual value. Finally, the work about which the Court makes legal judgments is an individual expression in action; it is an individual value that is legally and hence socially construed as being right or wrong, protected or unprotected expression. Yet, individual value implicit in a work is also simultaneously a social value, both in terms of the consensual interaction by which the Court justices render judgments on obscenity and in terms of the fact that these judgments manifest obscenity as general social value.

Obscenity as simultaneous social and individual value means that social standards cannot be evoked without a consideration of the values of both the individual who creates a work and those who encounter the work. Conversely, one cannot consider the values of the individual who creates a work and those who encounter it without an evocation of social standards. This process is the nature and functon of communication.

Merleau-Ponty argues from a phenomenological perspective that speech creates meaning in communication.[17] Essential (empirical) speaking is sedimented speech (*langue* as social value).[18] Existential (authentic) speaking is *speech* which is a unique generation of meaning by the person in a concrete context (*parole* as individual value). A particular speaker draws pre-established signs from sedimented speech to constitute a particular meaning in a particular context. As a dynamic between *langue* and *parole*, speech constitutes a simultaneous social value and individual value in communication. As a simultaneous social value and individual value, obscenity is constituted by speech in communication.

Within phenomenology, speaking functions as a rhetorical ethic in communication. Rhetoric is "... the pragmatic discourse where a social value is ascribed to the explicit behavior of persons."[19] Ethics is "...a value generated in discourse that is implicitly a condition for personal experience."[20] A phenomenological view of rhetoric is a creation of an object *for* consciousness and ethics is the constitution of an object *of* consciousness by "...the authentic choice made by a person in a world of other persons."[21] Speaking is thus a generation of social value (rhetoric) by the individual value implicit in authentic choice (ethic) in communication. Obscenity is constituted as a simultaneous social value and individual value by the speech act as a rhetorical ethic in communication.

The simultaneity of social and individual value in communication is a function of what phenomenologists call conscious experience.[22] Conscious experience is a "we-experience": it is an interpersonal relationship. The simultaneity of social and individual value in conscious experience is a function of the phenomenological concept of intentionality. Intentionality creates the self, the other and the world as meaning in a process of comunication. It is the act of giving meaning (an individual value) to self, other, and world as a horizon of meaning (a social value); perception creates the world as an expression. Here, thought is action because as a perception it transforms a world by an expression of that world.

Because of the nature of comunication within a phenomenological perspective, the perception implicit in a justice's judgment creates obscenity as a social value in an expression of a world. The justice's thought is action. A justice does not render an "objective" judgment either individually or as part of a collective of justices. Nor, is this another way of saying that a justice's judgment is subjective. The judgment is not strictly "subjective," just as it is not strictly "objective." Instead, the judgment is intersubjective. An intesubjective standard is a definition of a context which is a context for that definition. The context is "...the social world, not as an object or sum of objects, but as permanent field or dimension of existence."[23] In an intersubjective judgment, the justice adopts a particular stance (perception) toward a work which transofrms the social value implicit in the work as the context for that transformation (expression). Therefore, the judgment changes the judged. What makes up obscenity is a funciton of a formal judgment made by delegated authorities in a particular social context. This function is not just the obvious administrative trappings of the legal process but an essential, ontological role in constituting obscenity in a process of discourse.

The Court's ontological function is relevant to the issues of balancing interest and bias. As an essential part of the process of communication that creates obscenity, the Court is by definition "biased" both as a synergistic whole and an additive set of individuals. It is biased as a set of individuals because of the perception of each of the justices that transforms the value of a considered work by the phenomenological concept of expression. It is biased as a synergistic whole because the social interaction by which the justices make decisions is rooted in this phenomenological dynamic between perception and expression which takes place in the conscious experience of each justice.

That individual thought and action as individual value creates obscenity as social value in communication also means that the works themselves as individual thought and action create obscenity as social value. Simultaneously with the definition of a work in perception, the social value as the context of that perception shifts in expression. Individual value hence creates social value. A work, then, locates itself in a discourse by perception and becomes an essential part of that discourse as the transformation implicit in expression. The dynamic between the work as perceptin and the work as expression is implicit in a taken perception (a consideration of a work) or a given perception (a creation of a work).

For example, a person may construe the book, *The Story of O*, as obscene because it is perceived as immoral. Even if the person does not read the book, her or his construal of the book as obscene due to immorality is an essential part of her or his social discourse. The book *is* obscene because it is perceived and thus expressed as such. The book becomes part of the perceiver's identity as a social being. In consequence, the reader is immoral because, by perception, she or he is located in a social discourse which constitutes immorality as an obscene book. Perceived immorality becomes expressed immorality. This formulation means that the argument that if one finds a work offensive, one does not have to view or read it is not appropriate. The perceived offensive work is part of one's identity as a social being and thus ontologically inescapable. A person may also perceive the book as not obscene, for whatever reason. By the same phenomenological logic described here, perceived non-obscenity becomes expressed non-obscenity. The book *is not* obscene because it is perceived and expressed as being *not* obscene. The book is part of a social discourse and that person's identity as a function of that discourse.

Henry Clor carries the analysis of social discourse a step further. He suggests that an individual's dignity derives "from his or her capacity for freedom of choice." But this freedom is denied the characters themselves in obscene material. Says Clor, "The characters in pornographic literature are without dignity because they are totally at the mercy of passions and physiological reactions. Indeed, pornographic literature is devoted to emphasizing, elaborating, and thrusting upon our attention those circumstances in which human freedom of choice is swallowed up in elemental deterministic processes."[24] Yet, if a film actor in Deep Throat perceives the film as not obscene, she or he expresses it as such. This action locates the film in social discourse as not obscene and the social identity of the actor is one of not being obscene. Conversely, if the actor perceives the film as obscene, he or she expresses it such that obscenity becomes an essential constitutent of the film in social discourse and in his or her identity as a social being.

The creators of a work may perceive it as serving a sexually liberating function and thus not obscene. This perspective also creates the work as a particular social value. Here, the social value is non-obscene liberation rather than obscene oppression, immorality, and so forth. The creators of the film may construe the work as art, and therefore not obscene. No matter what the construal, the work as the creators' perception is a concurrent expression which is a context of that perception. It is simultaneously social and individual value. Hence, the film construed as art, profit, and so forth, is an essential constitutent of social discourse and the social identiy of the film's creators.

From a phenomenological perspective, what is obscene is a function of a particular perspective in a constantly shifting discourse: obscenity is a relative phenomenon. The relative structure of obscenity in the Court's interpretation of the First Amendment does not specify a philosophical solipsism just as it does not posit a political anarchism. Also from a phenomenological perspective is the idea that political freedom is present in a process of conventional social discourse and is by philosophical definition a responsible action. Individual value responds to a social context and transforms that context in a response which becomes an essential constitutent of future responses. Simply, what one puts forth, one gets back. Freedom of speech is thus a "freedom-within-a-situation."[25] The choices implicit in individual thought and action embody an ontological influence on the choices made in the thought and action of the other and, through the other, on the choices in thought and action made by the self. Thought and action as individual value have social ramifications in a process of discourse both in terms of their influence on a body of discourse itself and the creation of thought and action as on individual value which is a process of that discourse. Here, ethics is an ontological and not a moral structure. The social influence of the other in the thought and action of the self is an existential given.

In short, a phenomenological analysis reveals that the Court constitutes obscenity as simultaneous social and individual value. Thus, when formulating legal judgments about what is obscene, the Court manifests not only its own perspective as an additive function of individual values but also a social value as a synergistic function of group decision-making. The Court also manifests the perspectives of the individuals who perceive (individual value) and express (social value) a work as obscene, those who do not, and those who are apathetic as well as the perspective of the individual(s) who creates a work that the Court considers. The Supreme Court further manifests the general standards of social judgment surrounding a particular work and decisions about that work.

Obscenity as a Relationship Between Social Value and Individual Value

A phenomenological analysis of the *Miller* case shows that the Supreme Court constitutes obscenity not only as a social value and an individual value but as *a relationship* between social value and individual value. In phenomenological terms, the Court generates obscenity as a process link/dialectic between social value and individual in communication where the speech act as a relationship between *langue* and *parole* functions as a rhetorical ethic. The process link/dialectic is a conscious experience. Here, intentionality as perception and expression in thought and action creates obscenity in a historical, intersubjective life-world. This process is the nature of ontology, or existence. Because the present analysis reveals this process, it discovers an ontological structure and thus a meaning of the Supreme Court's definition of obscenity as exemplified in the *Miller* case.

The Supreme Court's Interpretation of Obscenity

The Court's notion of an average person applying contemporary community standards to determine whether a sexual work taken as a whole appeals to prurient interest and is patently offensive or demonstrates legitimate value is, from a phenomenological perspective, logically fallacious. It is logically fallacious in the sense of an ontology as a logic of being; social value is constituted by and reflected in individual thought and action as perception and expression. Social value is individual value; that is, what is socially obscene is a matter of who perceives what, why, how, when and where. The social standard of an average person, as well as the forum community, assumes there is one meaning for obscenity and therefore emerges as an ideal. Given an ideal standard, it becomes impossible for a particular individual to know what standards she or he violates under the Court's test for obscenity. The ideal of "an average person" or "community standards" are simply too vague in meaning. As Justice Douglas succinctly points out in his dissenting view in *Miller*, "Obscenity--which even we cannot define with precision--is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a nation dedicated to fair trials and due process."[26]

The standard of an average person constituted by a forum community is an ideal that denies the multiple factors and the synergistic relationship between these factors which define obscenity. The application of average standards by an average person negates the function of the infinity of individual values, as well as the dialectical process relationship of these values in discourse to a constantly shifting social context, in the meaning of obscenity.

To say that this standard is an ideal is not to say that obscenity does not exist, or even that an average person applying contemporary community standards to determine if a work as a whole appeals to prurient interests and is patently offensive sexual conduct does not exist. Obscenity, as is an average person in the community consensus forum on how to label a work, are real. What makes obscenity and an average person in an average community "real" is the dialectical intersection between individual perspectives and social context in communication. This intersection decides they are real. Yet, as a process of communication, they are constantly shifting in meaning rather than fixing as an ideal. The ideal of the average person in the average comunity is real but only as a logical fallacy. The ideal standard negates its own ontological foundation and is thus pragmatically nonfunctional. The average person and in the average community is real only as an abstract ideal. Here, communication denies itself as communication because it denies itself as a process link between social and individual value.

From a phenomenological viewpoint, the rejection of an ideal standard does not relativize obscenity into a meaningless abstraction. Instead, this rejection merely suggests that the Court's definition of obscenity creates obscenity as ontologically meaningful and thus a concrete location in particular spaces and times. Once again, obscenity is a function of who perceives what, how, when and where.

In this analysis, communication is not a cause-effect relationship but a process of mutual reciprocity in which the meaning of an act is construed or interpreted by a co-communicant. William Bailey criticizes the Supreme Court for its use of a linear model of interpretation in regard to the establishment of speech efficacy and thus restrictions on freedom of speech.[27] He maintains that one cannot, for example, establish the efficacy of speech as an incitement to riot. Thus, incitement to riot is not something one does to another or has done to one's self but a consensus.

In similar fashion, a specification of an ontological structure of the Court's definition of obscenity reveals a structure of communication which constitutes obscenity by a process of mutual reciprocity. Communication emerges as a transaction rather than an action or an interaction. Obscenity is a process of this transaction rather than an a priori given. Yet, the Court's notion of an ideal standard for the definition of obscenity denies the transactional nature of communication which makes up the obscene. A linear model of communication replaces a relational, synergistic process of communication. The Court posits an ideal obscenity which is external to a person. A person is subject to the influence of these external phenomena but cannot herself or himself influence them. Obscenity is something one does to another or has done to one's self rather than an ontological consensus present in the relationship between social and individual value.

Thus, a phenomenological analysis of the Miller case reveals a meaning of the Court's interpretation of obscenity present in the ontological structure of that interpretation. The structure constitutes as obscenity a relationship between social value and individual value, which, through the speech act in communication, functions as a rhetorical ethic. But, the Court's interpretation is also a denial of this relationship due to the Court's assumption of an ideal standard for interpretation.

Implications for Supreme Court Judgments on Obscenity

A phenomenological analysis of the *Miller* case indicates a needed shift in the legal conceptualization of what is obscene. A meaning of the Supreme Court's interpretation of obscenity implicit in the *Miller* case reveals that the Supreme Court needs an explicit account of both the multiplicity of individual values and the constantly shifting social context in its definition of the obscene. This recommendation is not an argument for an abolition of social standards. As implicated by a phenomenological analysis, social meaning and social standards for judgment exist as an ontological given. Justice Stewart's earlier observation of the Court's attempt to define obscenity is not entirely accurate. Obscenity as a social value is definable but only in its relation to individual values. Conversely, obscenity as an individual value is by definition a social issue and not simply a matter of individual choice. In short, the Court needs to consider obscenity as a social value and an individual value and a relationship between them.

Thus, a phenomenological analysis of the *Miller* case reveals that the Supreme Court needs an explicit account of its own ontological structure in defining obscenity. This account describes obscenity as a dynamic between individual and social value which communication creates. To aid in this process, the Court needs to see the issue of obscenity from a transactional rather than a linear perspective (which seems to be suggested in the minority opinion of *Miller*[28]) of communication. To do so may help the Court better understand the multiple social and individual factors at work which can affect a person(s) judgment when defining an obscene act.

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NOTES

[1] Franklyn S. Haiman, *Freedom of Speech* (Skokie, Ill.: National Textbook Co., 1976), pp. 111-112.

[2] *Ginzburg v. U.S.*, 383 U.S. 489 (1966).

[3] *Ginzburg v. U.S.*, 383 U.S. 498 (1966).

[4] Harry Campbell Black, *Black's Law Dictionary: With Guide to Pronunciation*, 4th ed. (St. Paul, Minn.: West Publishing Co., 1957), p. 1227.

[5] "Court Still Trying to Define Obscenity," *Milwaukee Journal*, 1 Jan. 1978, p. 7.

[6] *Jacobellis v. Ohio*, 378 U.S. 197 (1964).

[7] Roger D. Haney, "Obscenity and Pornography: Legal Arguments and Empirical Evidence," *Free Speech Yearbook* 1976 (1977), 47.

[8] *State v. Lerner*, 81 NE, 286 (1948).

[9] *Ginzburg v. U.S.*, 383 U.S. 479 (1966).

[10] *Jacobellis v. Ohio*, 378 U.S. 197 (1964).

[11] *Miller v. California*, 413 U.S. 20 (1973).

[12] Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. Colin Smith (London: Routledge and Kegan Paul, 1962), p. vii.

[13] *Memoirs v. Massachusetts*, 383 U.S. 419 (1966).

[14] *Jacobellis v. Ohio*, 378 U.S. 193 (1964).

[15] *Miller v. California*, 413 U.S. 24 (1973).

[16] *Miller v. California*, 413 U.S. 25 (1973).

[17] Merleau-Ponty, *Phenomenology of Perception*, p. 190.

[18] Richard L. Lanigan, "Rhetorical Criticism: An Interpretation of Maurice Merleau-Ponty," *Philosophy and Rhetoric*, 2 (1969), 63.

[19] Richard L. Lanigan, "Phenomenology of Human Communication," *Philosophy Today*, 23 (1979), 4.

[20] Lanigan, "Phenomenology of Human Communication," p. 4.

[21] Lanigan, "Phenomenology of Human Communication," p. 4.

[22] Lanigan, "Phenomenology of Human Communication," p. 6.

[23] Merleau-Ponty, *Phenomenology of Perception*, p. 362.

[24] Harry M. Clor, ed., *Censorship and Freedom of Expression: Essays on Obscenity and the Law* (Chicago: Rand McNally and Co., 1971), pp. 102-03.

[25] Calvin O. Schrag, *Experience and Being* (Evanston: Northwestern University Press, 1969), p. 209.

[26] *Miller v. California*, 413 U.S. 43, 44 (1973).

[27] William Bailey, "The Supreme Court and Communication Theory: Contrasting Models of Speech Efficacy," *Free Speech Yearbook*, 1980 (1981), 1-15.

[28] See in particular *Miller, pp. 37-47.*

MILTON'S VIABLE ATTACK ON PRIOR RESTRAINT IN THE *AREOPAGITICA*

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Speech holds a privileged status among constitutionally protected rights but even speech may be restrained under certain conditions. Especially for published speech, "freedom of expression is made inviolate by the First Amendment and, with only rare and stringent exceptions, may not be suppressed."[1] Although the permissible limits of censorship appear to have been shrinking throughout the twentieth century,[2] advocates of free speech must nontheless refresh their stock of arguments to address those who would impose restrictions with equal vigor. Moreover, advocates must apprehend the rationale for restrained speech in order to refute it aptly.

In this essay I examine the viability of an early attack on censorship by John Milton (1608-1674) with the goal of refreshing contemporary argument. Milton's contribution to the vigorous debate over censorship in seventeenth-century England is arguably noteworthy in itself. His contribution, however, provides contemporary advocates of free speech with two ingenious premises for their arguments. After examining Milton's historical contribution, I assess the current applications of his arguments.

Milton's Role in the Debate over Prior Restraint

Milton is best known for his epic poetry but, before reaching literary heights with *Paradise Lost* (1667), *Paradise Regained* (1671), and *Samson Agonistes* (1671), he applied himself to political agitation. After Oliver Cromwell's victory over the Royalists in 1649, for example, Milton became a propagandist for the revolutionary government. Only after Cromwell's death and the dissolution of the Puritan Commonwealth did Milton pursue a literary career. Even in his poetry, of course, Milton promoted the essential value of personal freedom which he first addressed in 1643.

In June, 1643, Parliament issued a "Licensing Ordinance." This decree responded to volatile conditions in English society: English intellectuals had frequently published pamphlets urging free thought but many clergy and the Royal Stationer had lobbied for a scrutiny of radical sentiments before their publication. Milton first entered the debate in August, 1643, with his publication of *The Doctrine and Discipline of Divorce*. His sentiments augmented an already sizeable volume of pamphleteering.[3] He also published *Of Education* in March, 1644, before contributing the *Areopagitica* to the debate in November of the same year.[4]

Milton's polemic on censorship in the *Areopagitica* lacked influence when it was disseminated.[5] His arguments, however, possess long-lived relevancy.[6] Indeed, Milton anticipated several of John Stuart Mill's assertions in *On Liberty* two centuries later. For example, Mill argued similarly in Chapter Two of his work that the free expression of attitudes and beliefs can precipitate substantial harm. In Chapter Three, Mill argued similarly that the pursuit of individuality promotes the development of essential "human" characteristics.[7]

Although force of circumstance diminished the immediate impact of his *Areopagitica*, Milton's pamphlet "gave enduring expression to that belief in the supreme usefulness of free thought."[8] As a summary of available arguments against prior restraint, Milton's pamphlet also offers tactical contributions to legal battles over the First Amendment.

Milton's Conventional Arguments

Much of the *Areopagitica* restates traditional lore. In signalling this predominance of conventional wisdom, the pamphlet follows a strictly classical disposition of exordium, narration, partition, refutation, confirmation, and peroration. Milton's exordium helpfully defines the reasonable bounds of civil liberty as those within which "complaints are freely heard, deeply considered, and speedily reformed."[9] The narration is similarly helpful in identifying offensive provisions of the Licensing Ordinance of 1643: "[N]o book, pamphlet, or paper shall be henceforth printed, unless the same be first approved and licensed by such or at least one of such, as shall thereto be appointed."[10]

The viability of Milton's refutation suffers from time-bound argument as well as style. Invective against the restrictive *Index* of the Roman Catholic Church,[11] and pious assertions that "to the pure, all things are pure,"[12] do not provide current advocates with particularly useful arguments. Furthermore, Milton's heavy-handed imagery does not address current tastes:

> Behold now this vast city, a city of refuge, the mansion-house of liberty;..the shop of war hath not there more anvils and hammers working, to fashion out the plates and instruments of armed justice in defence of beleagured truth, than there be pens and heads there, sitting by their studious lamps, musing, searching, revolving new notions and ideas wherewith to present, as with their homage and their fealty, the approaching reformation.[13]

Milton constructed an extended, metaphorical comparison between the sword and the pen which would unduly burden current judges. As with his argument about the *Index* of forbidden books and his bromide about the pure of heart, Milton's manner of speech restricts his efficacy to historical audiences.

On the other hand, selected portion's of Milton's argument presage currently popular lines of advocacy. Attacking the 1643 statute on its face, for example, he questioned whether the ordinance aptly addressed last-minute or picayune editing, much less the "copyrighted" work of deceased authors.[14] In effect, Milton challenged the statute as vague and overly broad--basic challenges in the briefs of current advocates. Moreover, the Areopagitica accurately places the burden of proof on censors. Employing the phrase "for aught we know,"[15] Milton expressed the current standard that prosecutors must demonstrate extraordinary conditions or malicious motives to avoid summary dismissal of their petitions for restraint. Most significantly, Milton also expressed two affirmative lines of argument which remain viable but which lack expression at present. These ingenious arguments draw sustenance from the principle of "neighbouring differences."[16]

Milton's Viable Arguments

For Milton, prior restraint is inapt when speakers espouse different points of view which are deconstructive but not destructive. His distinction currently finds analogous expression in comparisons between reform and revolution.[17] "Neighbouring differences" in architecture, for example, exist when:

> every stone is laid artfully together, [but] it cannot be united into a continuity, it can but be contiguous in this world:...the perfection consists in this, that out of many moderate varieties and brotherly dissimilitudes that are not vastly disproportional, arises the goodly and the graceful symmetry that commends the whole pile and structure.[18]

By arguing for receptivity to most expressions of sentiment--including unpopular ones--Milton presaged the "liberal" interpretation of the First Amendment that "public discussion" is a political duty.[19] Furthermore, he contributed one argument of policy and one of law which may refresh contemporary advocacy.

Dissent Shows National Strength

On policy grounds, Milton argued that vigorous dissent--regardless of a contemporaneous national emergency--shows popular faith in government. Indeed, engaging in public discussion of unpopular ideas during stressful periods illustrates the speaker's "singular good will, contentedness, and confidence in...prudent foresight and safe government."[20] This argument turns the twentieth-century standard for prior restraint articulated by Oliver Wendell Holmes on its head.[21] Rather than sustaining prior restraint, national emergencies should foster vigorous dissent as "a lively and cheerful presage of...happy success and victory."[22] Any nation which recognizes a "clear and present danger" merely stigmatizes itself as weak or petty when it restrains dissenting speech at critical times. Alternatively, any nation which permits free speech during critical times projects the image of "a noble and puissant nation rousing herself like a strong man after sleep."[23]

Arguing that dissent shows national strength may rest comfortably on precedent. As Milton protested to Parliament in 1644, so current advocates may argue that a nation conceived in liberty cannot coherently retreat from free speech without denying its initial franchise:

> Ye cannot make us now less capable, less knowing, less eagerly pursuing of the truth, unless ye first make yourselves, that made us so, less the

> lovers, less the founders of our true liberty. We can grow ignorant again, brutish, formal, and slavish, as ye found us; but you then must first become that which ye cannot be, oppressive, arbitrary, and tyrannous, as they were from whom ye have freed us.[24]

This argument possesses precisely the internal consistency which is being demanded of government. Unfortunately, the argument also smacks of speciosity. After all, Milton's protest does not admit exceptions to the rule and therefore suffers from an absolutist tendency. Here, however, the ingenuity of his argument emerges fully. He suggested that, in order to avoid the trap of absolutism, the advocate may either claim that "neighbouring differences" merely are at issue or define limits on speakers to whom the right of free speech attaches.

Responsible Speakers May Not Be Restrained

Milton echoed Aristotelian claims that truth will prevail in contests with falsehood so long as advocates for each side are equally proficient.[25] Milton also conceded "that...which is impious or evil absolutely either against faith or manners no law can possibly permit."[26] On legal grounds, then, the only speakers who should enjoy unrestrained freedom are those who are *presumably* or *demonstrably* "responsible." The definition of how a speaker may *demonstrate* responsibility merits close attention on a par with the current tests for obscenity and other *presumably* irrespnsible types of speech.

Lacking a clear test of which speakers hold presumptive rights, Milton located the adequate demonstration of a right to free speech in self-identification. Prior restraint, in other words, may only be imposed on sentiments which lack clear authorship or sponsorship: "Those which otherwise come forth, if they be found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectual remedy that man's prevention can use."[27] For Milton, the speaker who waives responsibility for his or her remarks by obscuring authorship also waives freedom from prior restraint. This standard of responsibility is desirably "legal" in the sense that the evidence of any violations may be obtained readily and demonstrated formally. Moreover, once established, this standard would provide sufficient notice to any and all speakers of their obligations.

The ingenuity of Milton's arguments lies in their joint articulation of a reasonably clear standard for free speech. By itself, the policy argument invites refutation on the grounds of undesirable absolutism or idealism. Conjoined with the legal argument, however, the policy of permitting free speech even in times of national emergency includes clear methods for defining precisely which speech is protected.

Current Applications

Freedom of speech in any given case must find at least implicit support within the First Amendment. Contemporary courts, however, recognize that we lack records of the original legislative debate over the First Amendment. One piece of collateral evidence stands out. The *Commentaries* of Sir William Blackstone (1723-1780) on the English common law was "pervasive" enough at the time to have soundly influenced the legislative debate.[28] For example, James Madison's original proposals were considerably more radical than the ultimate Bill of Rights. The relatively conservative tradition of English common law as summarized by Blackstone may be presumed to have sustained the modification of Madison's proposals. More specifically, Blackstone recognized substantial limits on speech:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[29]

Freedom of the press dominated Blackstone's attention in the same degree to which Milton had been concerned. This freedom was defined narrowly as a lack of "previous restraints" on the expression of free persons. Furthermore, the "speaker" was presumed to accept whatever subsequent liability might attach to the expression of particular sentiment.

Blackstone reserved special commentary for the origins of the British sense of prior restraint. Following his discussion of the basic doctrine, he observed:

> To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the [Puritan] revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.[30]

Blackstone's summary tied prior restraint doctrine to the events of Milton's milieu and expanded the doctrinal scope to include every form of significant expression.[31] To the extent, then, that Blackstone's legal summary of prior restraint can be said to have influenced the Constitutional debate over free speech, the historically related views of John Milton influenced Blackstone himself.

Milton's Areopagitica does not merely illustrate that concern over prior restraint is long-lived. By analogy, even the latest computing device may be traced to a prehistoric human penchant for counting on fingers. Rather, the Areopagitica contains tools of advocacy which remain viable in First Amendment cases. Two lines of argument in particular may refresh current advocacy.

Presently the only well-recognized method of overcoming the presumption against prior restraint is to demonstrate an extraordinary crisis which supersedes ordinary First Amendment rights. This crisis should parallel conditions which prompted the decision in U.S. v. Schenck (i.e., the sailing times of troop ships may be restrained from publication in time of war). If the severity of critical conditions cannot be refuted, and if the offending restraints are "precisely and narrowly drawn and provide adequate procedural safeguards,"[32] then the advocate of free speech stands on shaky ground. The Areopagitica, on the other hand, identifies policy grounds which may sustain the advocate's cause: freedom of expression reflects favorably on society especially at times of crisis. That is, the speaker demonstrates confidence in government by speaking freely, and the government demonstrates its own strength by permitting the speech. Disclosing the names of CIA agents, the disposition of ships and troops in the Caribbean, and other sensitive material should be permitted as protected speech _if_....

If speakers legally demonstrate their responsibility by identifying themselves within their speech, then they satisfy the only necessary qualification in Milton's policy argument. By definition, "irresponsible" speakers lack the credibility to make their disclosures valuable to societal enemies. This impaired credibility also arguably extends to speakers who are incompetent to act responsibly as well as to those who resist identification. By identifying themselves clearly, speakers would demonstrate a requisite commitment to their speech. Under this legal test, anonymous speech of all kinds could be restrained before the public was exposed to the messages. For example, graffiti could be erased, unsigned manifestos could be confiscated, and faceless public address announcements could be muffled. Unpopular but clearly authored or sponsored speech, of course, would resist prior restraint.

The "legal" demonstration of personal responsibility--as extracted from Milton's arguments in his _Areopagitica_--withstands critical scrutiny on several levels. This number and stratification of supporting arguments aid advocates equally well in addressing hearings on petitions for injunctive relief and in developing appellate briefs and related oral arguments.

First, textual and contextual criticism of the _Areopagitica_ has revealed that Milton originally argued on behalf of speech by "serious-minded men on serious topics."[33] For Milton, and arguably for current critics, it is reasonable to assume that speakers who readily identify themselves within their speech are more credible (i.e., "serious") than the authors of anonymous messages. Unlike Milton, however, current critics need not enmesh themselves in disputes over what constitutes "serious topics." Recognizing the pluralism in American society, critics may simply evaluate the proferred evidence of "serious-minded men."

Second, Milton's relatively precise formula for determining "responsibility" contravenes the chilling effect of vague laws on current exercises of First Amendment rights.[34] The critical question is whether today's potential speakers will more clearly understand the parameters of protected speech under Milton's formula or under existing tests in statutes and case law. The analogous though more specialized question of what constitutes "obscenity" underscores the need for legally adequate notice of unprotected speech.

Third, Milton's position reflects a potentially desirable and "normative" theory of the relationship between government and the governed.[35] In essence, any governmental restraint which adversely affects voters' command of the issues violates a basic right of free speech in democracies. After all, the individual citizen in a democracy is expected to reach decisions on the basis of personal conviction if not thoughtful reflection. Unrestrained public communications typically include the efforts at persuasion, if not information, on which the individual citizen may rely. Moreover, the government may possess an affirmative duty to make it possible for such communication to occur where it does not.

Summary

Milton's *Areopagitica* benefits current advocacy of free speech despite lacking the authority of legal precedent or legislative history. Under the typically multivalent circumstances of cases involving prior restraint, and especially where no statutory interpretation is dispositive, courts are receptive to relevant scholarly notes and essays. The *Areopagitica* merely awaits translation into contemporary language and legal tests before its arguments may be applied to cases at hand. Milton's work surpasses related historical arguments by permitting a "distillation into a concise formula applicable in specific instances."[36] Speakers may not be restrained, even at critical times, so long as they are "responsible" enough to identify themselves within their speech.

ENDNOTES

[1] *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 487 (1980) (Brennan, J. concurring).

[2] The Pentagon Papers case indicates the currently ambiguous standards for permitting censorship of sensitive but non-obscene speech (*New York Times Co.* v. *U.S.*, 403 U.S. 713 [1971]. In his concurring opinion, for example, Mr. Justice Brennan identified the "inevitable, direct, and immediate" harm to the United States and its citizens which must exist in order to sustain prior restraint of the harmful speech. This standard appears narrowly defined. Its application, however, to circumstances in which merely "potential" danger exists, and the speech content has already been "leaked" through other channels, suggests that Brennan's standard may actually be more expansive than it seems (*U.S.* v. *The Progressive, Inc.*, 486 F. Supp. 5 [W.D. Wis. 1979] [Warren, J. enjoining a local newspaper from publishing practical H-bomb plans]). The twentieth-century history of prior restraint doctrine clarifies the present state of affairs. Mr. Justice Holmes first suggested the permissible limits of prior restraint (*Schenck* v. *U.S.*, 249 U.S. 47 [1919]). Within Holmes' cryptic but memorable test of whether a "clear and present danger" existed, selected speech could be restrained before its expression in times of national emergency. Mr. Chief Justice Hughes, however, later established "the foundatin of modern prior restraint doctrine" (*Near* v. *Minnesota*, 283 U.S. 697 [1930]: and see Owen M. Fiss and Doug Rendleman, *Injunctions*, 2d edition [Mineola: The Foundation Press, 1984], p. 189). Although the statute under Scrutiny in *Near v. Minnesota* was ruled unconstitutional, the Chief Justice left the door open for other applications of censorship. Ramifications of this decision may be examined in more detail by consulting *Symposium: Near v. Minnesota, 50th Anniversary*, 66 MINN. L. REV. 1 (1981).

[3] For a review of Milton's rhetorical awareness, see Donald L. Clark, "Milton's Rhetorical Exercises," *Quarterly Journal of Speech*, 44 (1960), 297-301. For a survey of Milton's pamphleteering career, see Don. M. Wolf, *Milton in the Puritan Revolution* (New York: Thomas Nelson and Sons, 1941).

[4] All citations will refer to John Milton, *Areopagitica and Other Prose Writings*, ed. William Haller (New York: The Book League of America, 1929).

[5] Douglas Bush, *John Milton* (New York: Macmillan, 1964), p. 99.

[6] John J. Makay, "John Milton's Rhetoric," *Central States Speech Journal*, 22 (1971), 195.

[7] Cf. Robert F. Ladenson, *A Philosophy of Free Expression and Its Constitutional Applications* (Totowa, N.J.: Rowman and Littlefield, 1983), pp. 32-36.

[8] See the editor's preface to *Areopagitica*, p. xiv.

[9] *Areopagitica*, p. 4.

[10] *Areopagitica*, p. 7.

[11] *Areopagitica*, pp.15-16.

[12] *Areopagitica*, p. 19.

[13] *Areopagitica*, pp. 52-53.

[14] *Areopagitica*, pp. 36-38.

[15] *Areopagitica*, p. 48.

[16] "[T]hose neighbouring differences, or rather indifferences, are what I speak of, whether in some point of doctrine or of discipline, which though they may be many, yet need not interrupt the unity of spirit." *Areopagitica*, p. 61.

[17] The Conference of Critical Legal Studies, for example, espouses a neo-Marxist perspective on the American legal system which would nevertheless fall within Milton's definition of "neighbouring differences." See Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1982-83).

[18] *Areopagitica*, p. 54.

[19] Mr. Justice Brandeis, concurring in Whitney v. California, 247 U.S. 357 (1927), is credited with expressing the liberal view of First Amendment rights. See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948).

[20] *Areopagitica*, p. 55.

[21] See Holmes' standard in U.S.v. Schenck as discussed in note #2 above.

[22] *Areopagitica*, p. 56.

[23] *Areopagitica*, p. 56.

[24] *Areopagitica*, p. 57.

[25] *Areopagitica*, p. 59.

[26] *Areopagitica*, pp. 60-61.

[27] *Areopagitica*, p. 65.

[28] My use of the term "pervasive" follows Daniel J. Boorstin, *The Mysterious Science of the Law* (Cambridge: Harvard Univ. Press, 1941), p. 4. Continuing high regard for Blackstone is reflected in *American/Australian/New Zealand Law: Parallels and Contrasts* (St. Paul: West, 1980), papers presented at a joint meeting of the American Bar Association, Law Council of Australia, and New Zealand Law Society, Sydney, Australia, August 11-16, 1980, to commemorate the bicentenary of Blackstone's death.

[29] *Commentaries on the Laws of England*, 9th edition (London, 1783; rpt. New York, 1978), 4: 151-152. "Contempts and misprisions" against the King were seen as especially mischievous and made the perpetrator liable not only to fine and imprisonment but also the "pillory or other infamous corporal punishment." See 4: 123.

[30] Blackstone, 4: 152.

[31] Blackstone, 4: 349.

[32] See the discussion of the two prevailing tests of permissible prior restraints-as applied, for example, in National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)--in Jerome A. Barron and C. Thomas Dienes, *Handbook of Free Speech and Free Press* (Boston: Little, Brown, and Co., 1979), p. 43.

[33] John D. Stevens, *Shaping the First Amendment - The Development of Free Expression* (Beverly Hills: Sage, 1982), p. 28.

[34] See the concise but lucid discussion of "chilling effect" in Franklyn S. Haiman, *Freedom of Speech* (Skokie: National Textbook Co., 1977), pp. 40-42.

[35] See, for example, John L. Hodge, "Democracy and Free Speech: A Normative Theory of Society and Government," in *The First Amendment Reconsidered*, ed. Bill F. Chamberlin and Charlene J. Brown (New York: Longman, 1982), pp. 148-180.

[36] Ladenson, p. 75.

THE INFORMATION SOCIETY:

A NEW THREAT TO FREEDOM OF SPEECH

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As we enter the information society we see revolutionary changes in communication. Some of these changes will enhance the free flow of information; the positive benefits of greater access to information have received widespread attention. A probe beneath the surface of these positive developments reveals some omnimous long range consequences.

The root of the problem lies in the economic value which information is coming to assume. As the generation and sale of information comes to be the dominant activity in the US economy, the very foundations of the ideal of a free flow of information are challenged. The free exchange of information reduces the economic worth of that information.

If information is expensive, it may be impossible for speech to be free.

Those of us in the field of communication long have recognized the importance of information exchange for the success of political, social, and economic activities. In the information society information exchange gains additional importance--it becomes the basis for the economic activity of the society.

We have been familiar with the agricultural society with its emphasis on the production of food and fiber, and with the industrial society with its emphasis on the production of energy and manufactured goods. In the information society, the central economic activity is the production and sale of information. Information becomes not just an adjunct to the production and sale of other goods, it is the commodity which is sold.

There is ample evidence that the transformation to an information society may have occurred already in the United States. By the late 1960's about half our labor force was engaged in information occupations. Approximately half the Gross National Product of the U.S. was due to information activities. The detailed analysis of the evidence for this transformation is beyond the scope of this paper.

The concept of an information society has generated an extensive literature. The most complete analysis of the role of information in the economy is Porat's nine-volume study for the Department of Commerce.[1] The prominence of information has given renewed impetus to concerns for the loss of personal privacy through the rapid growth of government and corporate computer the allocation of information resources among nations.[3] The current acceptance of the concept is further illustrated by the existence of a journal, The Information Society devoted exclusively to studies of its impact.

Given that there has been a basic transformation of the society in ways which have a direct impact on the exchange of information, it is imperative that we assess the significance of this impact on Freedom of Speech. This paper addresses the issues which appear to me to be most important.

The information society challenges the traditional processes of free speech in two general ways. First, in the information society speakers will have a difficult time gaining access to a wide audience because of the multitude of communication channels available. Although this appears to be the major threat, its impact will be substantially less than the second challenge which is the widening of the gap between the information "haves" and the information "have-nots." This will result from the dramatic change the information society will produce in the "market place of ideas." These changes will threaten the very foundations of the principle of freedom of speech.

The Changes in Access to the Audience

The many new communication technologies bring with them a wide fragmentation of audiences. We are moving from having a few national television networks to a broadband communication system with multichannel cable systems, direct broadcast satellites, video recorders, as well as the more familiar radio and television systems. Many of the free speech issues in the broadcast technologies have centered on the ability to gain access to the broadcast audience. Such areas as the Equal Opportunity provision of the Communication Act, the public service obligation of broadcasters, and the short lived cable television access channels have been prominent in this attempt to insure that speakers had equal opportunity for access to the broadcast audience.

With the many new channels of communication now becoming available, it is clear that that access will become even more difficult. In addition to all the issues which have been important in the broadcast area, a new concern is raised--the audience is divided among an increasing number of different channels. In the broadcast era, gaining access to the audience meant getting on one or more of the national networks. In the future it may be impossible to gain access to the national audience without getting on dozens (perhaps even hundreds or thousands) of different outlets.

This will provide a significantly different environment for free speech. At first this appears to raise a host of new problems. Upon further reflection, it can be seen that this change really returns us to a series of familiar problems. In many ways the era of national networks was an unusual time in the history of communication. Prior to that time, speakers had no way to reach the national audience simultaneously. In fact, in the colonial environment, the problems of reaching a broad audience were quite similar to the problems faced in the emerging era of multichannel communication.

The new channels offer the opportunity for a multiplicity of voices to be heard in ways that were impossible during the era when the national networks controlled the attention of most of the population. If the access to these channels can be granted to a wide range of views, the emerging technologies should promote an environment which allows greater freedom of expression than has been known for some time. The key is to insure that the control of access to these channels and their audiences is shared by a wide range of groups. The danger is that access to many of these channels may be controlled by a few special interests.

The challenge presented to freedom of speech by the changes in the electronic media might be met in ways that could provide vast new opportunities for expression. The fragmented audiences the new media create could allow many more speakers to be heard. The challenges presented by the social changes which come with the shift to an information economy are less likely to be met in ways that promote free speech.

The Changes in the Market Place of Ideas

One of the traditional philosophic foundations for Freedom of Speech has been based on the concept of the "market place of ideas." As Holmes and Brandeis wrote: "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of thought to get itself accepted in the competition of the market...."[4] The coming of the information society has led to significant changes in this marketplace. Ideas and information which have significant economic value may not be expressed openly in the market place. Much of the economic value of information is lost if it is widely disseminated. In an agricultural society, those who possessed goods did not trade them freely in the market place. They sold the goods only to those who could pay for them. In the industrial society the manufactured goods are sold only to those who can pay for them. In the information society, it is reasonable to expect that information would be sold only to those who can pay.

This change in the economic value of information has two primary impacts: First, the gap between the information available to speakers with great financial resources and the information available to speakers with limited resources will be widened substantially. Speakers with limited resources will be at a severe disadvantage because they will not have access to the information needed to refine their ideas. Their effectiveness in the market place of ideas will be further limited by their inability to obtain the information they need to support their ideas. Second, potential speakers who do have access to information will face increasing restraints on using it in public discourse because disseminating the information would reduce its economic value.

It always has been the case that there was some information which was not available in the free market place of ideas. The growing economic importance of information in the information society appears to pose a serious threat to the free market place. In the past the information which was not available in the free market place was generally limited to military and industrial secrets. Other information was generally available to any one, without any payment. If a speaker were a diligent researcher, the relevant information could be found with some effort. Even today this is nolonger true. Those with sufficient funds have available far greater resources. As publishers come to look at themselves as "information providers" many of the sources we have traditionally used will disappear. It is likely that only the wealthy will have access to many of the information sources. The rest of us will become information have-nots if we cannot afford to pay the established prices.

An example illustrates the change. The New York *Times Index* has been a mainstay for speakers who wished to gather information on politicians and public issues. Recently the New York *Times* began a vastly expanded "on line" computer search service. Now speakers who can afford the charges for computer time can use this service to search the entire text of all New York *Times* articles for any names, words, or phrases they think are relevant. Any articles they wish to read can be printed immediately on their computer terminal. In a short time speakers with the funds to pay for this search can get far more information than less wealthy speakers can obtain from months of searching the printed indexes and reading articles from copies of the New York *Times*. Clearly speakers with the money for the computer search will have more extensive and complete information to use in presenting their views persuasively.

The long range outlook for developments in this area suggests that the gap between the information available to the rich and the poor will continue to grow. As more and more wealthy users turn to the computer data bases, continuing to publish the printed indexes will become less and less feasible. As the printed indexes die off, speakers without funds will find themselves even more handicapped than they are today.

Some people have suggested that this problem will be solved by libraries offering free searches to their patrons just as they offer the printed indexes free today. I think this is unlikely for two economic reasons: the computer sources charge for *each* use of their data bases; and, the number of data bases is growing rapidly.

Traditionally libraries have purchased books which can be shared by all their patrons. After the volume is purchased it can be used by a great number of patrons with no further cost. With a computer data base there is a charge for every use. If ten patrons use the data base, there are ten charges. If fifty patrons use the data base, there are fifty charges. No library has the resources to pay for all the searches its patrons could need. Most have adopted a poicy of charging users directly for the cost of their searches (perhaps offering a brief free search before charges begin).

Thus, even at the library, the traditional haven of information for the poor, the rich will have access to far more information. To a large extent, those without the funds to purchase information will find themselves closed out of the "market place of ideas" because they will be unable to obtain the evidence they need to support their ideas in a persuasive way.

New data bases. Computerized data bases are being established in a wide range of fields. Each year sees the establishment of many new services, as well as the enhancement of existing services.

Researching court opinions no longer requires hours of tedious working with citation tables, digests, and indexes--if one has the money to pay for a computer search. Any speaker who can not afford such a search can be overwhelmed by the mass of precedent presented by someone who can.

Many of the filings corporations are required to make with the SEC are now available for on line computer searches--if one has the money to pay. In addition to detailed financial information on corporations and industries, these filings include records of pending legal cases which could have a substantial impact on the corporation's worth. Consumer advocates with limited resources have no way to gain access to this information, and they have no way to respond effectively to arguments presented by speakers who can pay for this information.

The situation is similar in almost every area of public policy. There are specialized data bases for various fields of chemistry which contain essential information for public discussion of environmental issues. There are specialized data bases in medicine which are important for public discussion of health care policies. The list could go on and one, but the point is clear--speakers who can not afford to use these data bases are seriously limited in their ability to participate in the discussion of public issues.

Thus far, I have been discussing information sources which are available to those who can pay to use them. The disparity between the information haves and the information have nots is widened further by the increasing numbers of information sources which are shared only by an economic elite.

Ownership of Information. Many individuals with access to important information are finding themselves seriously limited in their freedom to express themselves in public discourse. As information comes to be the central focus of the economy, more and more controls will be developed to insure that it is released only in the ways the "owners" of the information want it to be released. In the agricultural society we developed complex means of insuring that crops and animals were not taken from their owners. Similarly in the industrial society, most plants developed sophisticated systems to insure that the workers did not steal valuable property. It is clear that similar controls will be developed in the information society.

The controls for the information society will have an important difference from the controls in the agricultural and industrial societies. If someone steals a piece of physical property--say a horse--it is clear what has been taken. The thief has deprived the owner of the economic benefits of the horse and is punished accordingly.

One does not steal information in the same sense. The information loses much of its economic value when it is revealed. Although the owner may still have the information, the economic value of that information is reduced when others also have the information. Making the information public deprives its owner of its economic benefits. The punishment, if there is to be any, would be for revealing the information. Speaking information one does not own could become the information society equivalent of horse theft. Employees, government officials, and others who reveal information will be exposing themselves to potential punishment, because their revelations will have a potentially adverse economic impact on the owners of that information.

This poses a further threat to the fundamental concept of freedom of speech. The citizens with access to information will find themselves under increasing threat if they reveal information in ways that are later held to be inappropriate. This could produce a serious chill on public discourse. Since individuals with access to relevant information may be unclear about what information they discuss, they are likely to adopt the cautious policy of saying as little as possible.

This could result in a situation where the public discussion of important issues was largely confined to those who know the least about information relevant to decisions about those issues. Such a development would make it difficult to have the sort of informed discussion which is essential for the democratic process to function successfully.

In Conclusion

Those of us in the field of Speech Communication need to be particularly vigilant in monitoring the impact of the information society on the fundamental concepts of freedom of speech.

We need to insure that access to the multiple new channels of communication is granted in ways that promote freedom of speech.

We need to work aggressively to minimize the impact of the growing disparity of information resources available to the haves and the have nots. This can be done by advocating the development of reasonably priced information resources for use in public discourse. It can also be done by identifying rhetorical strategies which make the most effective use of those limited information sources which are widely available.

We need to be alert to the evolving body of law and precedent which is developing for the control of the flow of information in the information society.

We need to argue articulately and effectively for the importance of balancing the rights of the owners of information with the greater social goals promoted by freedom of speech.

Free speech can be preserved in an information society only if those who are concerned with maintaining free speech are alert to the threats the information society brings.

NOTES

[1] Marc Uri Porat, *The Information Economy: Definition and Measurement* (Washington: U.S. Department of Commerce, 1977). Porat provides a brief summary of the study in "Global Implications of the Information Society," *Journal of Communication* 28 (Winter 1978): 70-80. For a recent overview see: Michael R. Rubin *Information Economics and Policy in the United States* (Littleton, Colorado: Libraries Unlimited, 1983).

[2] One place these issues are presented is in: Oswald H. Ganley and Gladys D. Ganley, *To Inform or To Control?: The New Communication Networks* (New York: McGraw-Hill, 1982).

[3] A recent review of this topic was presented in a series of articles published as a "Global Flow of Information: Trends and Patterns" section, *Journal of Communication* 34 (Winter 1984): 120-175.

[4] 250 US 616 at 630.

PLATO AND THE TOTALITARIAN STATE

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The long-running academic controversy regarding the effect of Plato's political writings on the structure of modern governmental systems has been well stated by Thomas Thorson in the book, *Plato: Totalitarian or Democrat?* "The point at issue [he writes], precipitated undoubtedly by the emergence of totalitarianism alongside liberal democracy in the Western tradition, is whether Plato is to be understood as the forefather of totalitarianism or of democracy."[1]

Certainly, the latter position has not lacked defenders. Commentators of the stature of John Wild have charged that Plato's accusers are only attacking a political theory, not a real situation[2] (although Wild fails to mention Plato's trips to Syracuse where he tried unsuccessfully to implement his ideas).[3] John Hallowell's defense is based on a distortion which would have been deeply alien to Plato: a state in which everyone has the ability to "know the good and...to choose the good when known."[4] Finally, there is Gustav Mueller who simply denounces any who would attack Plato as "members of an Aristophanic frog-chorus."[5]

At the risk of joining the "croaking choir," we propose to examine a single aspect of Plato's writing--that of communication in his "Republic," and argue that Plato's concept of communication (e.g., dialectic, poetics, and rhetoric) in his ideal society conforms closely to that of modern totalitarianism because both are characterized by a central direction and control of the entire communicative process, the aim being to maintain the power of government for the ruler by arresting change, thereby securing the "good" of the nation.

Relative to such an investigation, it should be noted that regulation of communication in a state is only a means, the full understanding of which necessitates inquiry into the ends served by such control. Therefore, this paper will initially direct its attention toward the ideological foundation upon which Plato conceived his ideal society: the concepts of "ultimate good" and the maintenance of state control by the ruler through the arresting of change.

In their political study, *Totalitarian Dictatorship and Autocracy*, Carl Friedrich and Zbigniew Brzezinski[6] observe that "totalitarian ideologies are typically utopian in nature."[7]

Further, "[Totalitarians] are fanatics when it comes to maintaining their own ideas. They seem to believe passionately in *their* truth."[8] Taken together, these statements comprise an almost perfect description of Plato's political ideology.

Examining the *Republic* in terms of its "utopianism," it is only necessary to keep in mind the social structure which Plato superimposed on it to grasp the significance of the relationship. The Republic was a plan for a rigid three class state. At the bottom were the workers, who were not fit to govern themselves; higher up came the auxiliaries, who defended the state; and at the top were the guardians, who were to be the rulers, and from whose ranks the chief ruler or philosopher-king would be chosen.

It was on this last-named individual that Plato predicated his whole political program. To him, the philosopher-king was a "seeker after truth" and, therefore, able to distinguish the genuine idea of a thing from its many imitations. He explains: "But who are the true philosophers? Those...who are lovers of the sight of truth."[9] And in a second passage, he adds: "...[the philosopher-kings] must raise the eye of the soul to the universal light...and behold the absolute good; for that is the pattern according to which they are to order the State..."[10]

The unexpressed argument in both these passages is the crucial one. In requiring the leaders of his state to administer the laws on the basis of absolutes, Plato was providing a key to his own metaphysics and epistemology. Here was a man who believed in unchanging standards. Such a thing as perfection existed, even if it was in the "forms" or "ideas" which were somewhere in the heavens or beyond. And because his state had been predicated on this utopianism through the insight of the philosopher-king, any change in the nations' ideology could only be a change for the worse.[11]

Such a prohibition against change brings us to the second aspect of Plato's ideology; namely, the degree to which his rulers were permitted to go in maintaining this truth. Simply put, every action undertaken by the philosopher-king, and every function performed by his auxiliaries, was to have as its aim, the single purpose of arresting change in order to perpetuate the state as it had been originally conceived.

Beginning with the basic doctrine of class rigidity, the purpose was to prevent "any meddling of them with one another, or the change of one into another, [which] is the greatest harm to the State...[12] Nor could there even be change within classes. As Plato noted, this was "the original principle of which we spoke at the foundation of the State, that every man...should practice one thing only, that being the thing to which his nature is most perfectly adapted."[13]

In the vital area of education too, all change was to be suppressed for the sake of stability. Plato explains: "This is the point to which, above all, the attention of our rulers should be directed--that music and gymnastic [the basic curriculum] be preserved in their original form and no innovations made."[14] And the purpose of education was also stability: The intention [Plato says]...is to put each individual man to that use for which nature designed him."[15]

It could also be argued that a crude form of birth control was to be practiced with the goal of maintaining a constant population figure. Plato writes: "...the number of weddings is a matter which must be left to the discretion of the rulers, whose aim must be to preserve the average of the population."[16]

Even the guardian class itself was to be restricted in respect to money,[17] property,[18] and family ties[19] in order to remove what Plato conceived of as any motivation to destabilize the state by going beyond the limits which he had set for the guardians[20]. And as a final defense against change, Plato warned the guardians to build their living quarters where they could maintain careful surveillance: "Let them look around and select a spot whence they can best prevent insurrection, if any prove refractory within."[21]

At this point, having established that the ideological foundations of the "Republic" were totalitarian, we must address the charge that Plato controlled and utilized communication to govern his state. Control of communication is a two-edged sword. Not only does it imply censorship (i.e., preventing certain information which the government deems harmful from being presented to the people) but also what might best be called propaganda. The propagandist's job is to make certain that essential ideas which the rulers consider vital for the maintenance of the society are presented to the people, and in as favorable a manner as possible. Always the yardstick is the same; will a particular piece of information hinder or further the goals of the community, as determined by the absolute ruler? Friedrich and Brzezinski summarize the major features of communication control when they write: "...propaganda is essentially action related; it aims to get people to do or not to do certain things."[22] With this in mind, it is possible to argue that Plato's state specified dialectic for the rulers, censorship of poetics for the preservation of cultural stability and rhetoric for political control of everyone else, with the justification for control in all cases being the "good" of the nation.

For the future guardians, training in dialectic was preceded by a rigidly controlled, state-directed education. The basic curriculum of music and gymnastic was closely circumscribed by Plato with restraints designed to prevent the student from acquiring any knowledge beyond that which the state considered acceptable. For example, in literature, which was deemed a subdivision of music, Plato writes: "...we should begin by telling children stories, which, though not wholly destitute of truth, are in the main fictitious."[23] In music, certain types of melody could be used to instill required virtues in the children. Plato confesses: "Of the harmonies, I know nothing, but I want...one warlike, which will sound the note...of stern resolve; and another [for] times of peace and freedon of action."[24]

The very nature of such a program together with the malleable age of the students,[25] made possible the training of neophyte guardians in accord with the dictates of the state. "If we can believe [Plato's] words, his main reliance was upon persuasion. This is evident from the emphasis upon education in both the Republic and the Laws, in each case for the purpose of producing citizens who have learned to like what the law enjoins and to dislike what it forbids."[26] Admittedly, as they grew older, these future leaders were to be presented with viewpoints other than those held by the rulers. But the initial indoctrination had already taken place, and as Plato himself notes. "[they who] are most likely to forget or be deceived...[are] to be rejected."[27]

Even the ultimate training in dialectic, a process roughly equivalent to the scientific method and productive, in Plato's view, with "comprehending all true existence,"[28] was closely restricted, and future guardians were not allowed to join the ranks of the dialecticians until they were well past the prime of life and the fires of individuality had been banked with age. As Plato put it: "...when a man gets older, he will no longer be guilty of that sort of insanity [employing dialectic for something other than the goals of the nation]; he will follow the example of the dialectician who is seeking for truth, and not of the eristic, who is contradicting for the sake of amusement..."[29]

In the case of poetry, the problem, as Plato saw it, was generally one of the minstrels' depicting unrest, a condition which was not to be allowed in the Republic, dependent as it was on absolute obedience. Therefore, Plato implores: "If [the people] would only believe us, we would tell them that quarrelling is unholy, and that never up to this time has there been any quarrel between citizens...and these are the sort of fictions which the poets should be required to compose."[30]

In the case of drama, the problem at base was one of a single actor performing several roles, a condition which Plato could not allow in his state, organized as it was on the basis of one person for one task. He warns: "...when anyone of these clever multiform gentlemen comes to us, and proposes to exhibit himself...we will fall down and worship him as a sweet and holy and wonderful being, but we must also inform him that there is no place for such as he is in our State--the law will not allow them."[31]

For the masses, education beyond the most rudimentary level was denied. This did not mean, however, that the state was unconcerned with them. The very fact that they were largely uninstructed meant that it was necessary for the rulers to manage their lives. This they did with a mixture of political and religious myths, ("noble lies," as Plato called them), which would appeal to their emotions and thereby stimulate them into obeying laws which they really did not understand.

By the "noble lie," there can be no doubt that Plato was referring to rhetoric, which to him was a genuine attempt "always [to] aim at what is best...and to desire only the greatest improvement in the citizens,"[32] although he admitted that even the highest rhetoric could only present "likenesses" of truth and that it achieved the power to "persuade a multitude by...flattering tales and not by teaching."[33] Put differently, it was acceptable for the ruler to lie to the people provided he himself knew the truth, a kind of sophistry which modern totalitarian states practice under the label of disinformation. Indeed, it may be argued that the qualities which Plato attributes to the philosopher-king in the Republic are very similar to those which he prescribed for the ethical practioner of rhetoric in the Gorgias.[34]

On several occasions, most notable of which is the "Myth of the Golden, Silver and Brass Children," Plato illustrates how such rhetoric can be used to keep the masses satisfied with their lot.[35] And he frequently refers to the need for the leaders of his Republic to employ such devices when they guide the state.

"I mean," he writes, "that our rulers will find a considerable dose of falsehood and deceit necessary for the good of their subjects."[36]

It should be noted at this point that the use of falsehood was the exclusive monopoly of the guardians. As Plato bluntly observes: "...the rulers are the only persons who ought to have the privilege of lying, either at home or abroad; they may [also] be allowed to lie for the good of the State."[37] Of the others, however, he warns: "But nobody else is to meddle with anything of the king; and for a private man to lie in return...is to be deemed a most heinous fault..."[38]

Rhetoric was not only a means by which the guardians controlled the lower classes; Plato also empowered the philosopher-king to use it in maintaining authority over his lieutenants. Basically, the problem involved keeping these paladins satisfied with the fact that they were not to employ their vast powers for selfish ends. Plato writes: "How then may we devise one of these falsehoods in the hour of need...just one royal lie which may deceive the rulers...?"[39] And he proceeds to hoax them with what we may call the "Myth of Gold and Silver Superiority": "Gold and silver we will tell them that they have from God; the diviner metal is within them, and they have therefore no need of that earthly dross which passes under the name of gold, and ought not to pollute the divine by earthly admixture, for that commoner metal has been the source of many unholy deeds, but their own is undefiled.[40] Even though the guardians had been indoctrinated with the concept of "Staat uber alles," rhetoric was deemed necessary to curb those human propensities which might bring disorder even to the highest class.[41]

Admitting that such deceit by the philosopher-king did not elevate this "higher"rhetoric above the myths and fables fed to the masses, two important points remain. First, if the guardians, from whose ranks the philosopher-king was chosen, were to be lied to and believed the lie, each of them would have great difficulty distinguishing truth from falsehood, which is the necessary prerequisite for becoming philosopher-king. Second, and more importantly, such a lie carries with it seeds of self-destruction for both the ruler and the state. The assumption by a ruler of unique omniscience is followed quickly by the folly of presumed omnipotence--the impossible notion that one person is capable of controlling all aspects of state life. No one has ever attempted such awesome responsibility successfully. If the ruler starts believing that only he is competent to decide all issues, then the fall of his state is at hand. Whether Plato fully understood the consequences of such a situation is open to conjecture. However, some recent examples of totalitarian leaders--notably Adolf Hitler--provide a grim lesson regarding the results of such attempts at complete control.

In conclusion, it seems reasonable to maintain that Plato's ideal society fully meets the requirements of a totalitarian state as set forth by Friedrich and Brzezinski. In the "Republic," not only was all communication controlled and regulated for the masses, but in a few vital respects, even for those in a position of leadership. As a substitute for truth, the state provided a judicious mixture of censorship and seeming rhetoric, the aim being to arrest change and thereby secure the "good" of the nation as Plato conceived it.

Endnotes

[1] Thomas Thorson (ed.), *Plato: Totalitarian or Democrat?* (Englewood Cliffs: Prentice-Hall, Inc., 1963), p. 1. Thorson, who is Associate Professor of Political Science at the University of Wisconsin, has collected a number of essays on the subject, both pro and con.

[2] John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago: University of Chicago Press, 1953), p. 41.

[3] Plato's trips to Syracuse and the reason for them are recounted in H. I. Marrou's, *A History of Education in Antiquity*, trans., George Lamb (New York: Mentor Books, 1964), p. 99.

[4] John Hallowell, *The Moral Foundation of Democracy* (Chicago: University of Chicago Press, 1954), p. 112. Indicative of Plato's thinking is this passage from the "Republic." "And by reason of this smallest part or class of a State, which is the governing or presiding class, and by the knowledge which resides in them, the whole State, being in the order of nature, will be called wise; and nature appears to have ordained that this, which has the only knowledge worthy to be called knowledge, should by the smallest of all classes." Plato, *Republic*, in *The Dialogues of Plato*, Vol. I, trans., Benjamin Jowett (New York: Scribner, Armstrong, and Co., 1878), p. 253.

[5] Gustave E. Mueller, *Plato, The Founder of Philosophy as Dialectic* (New York: Philosophical Library, 1965), p. xx.

[6] Carl J. Friedrich and Zbigniew K. Brzezinski, *Totalitarian Dictatorship and Autocracy* (New York: Fredrick A. Praeger, 1962). Friedrich was Eaton Professor of History at Harvard. Brzezinski was Director of Columbia University's Research Institute on Communist Affairs. More recently, he was President Carter's National Security Advisor. The authors propose a pattern of traits common to all totalitarian societies: a political standard against which the "Republic" can be measured. The list includes six distinctive characteristics, of which communication control is one. In a more complete study of which this paper is a part, Plato's "Republic" is measured against all six of the characteristics, and the conclusion is that it is totalitarian in every respect.

[7] *Ibid.*, p. 74.

[8] *Ibid.*, p. 71.

[9] *Republic*, p. 303.

[10] *Ibid.*, p. 368.

[11] In the *Laws*, Plato again returns to this subject of arresting change and notes: "Any change but the change of the bad is the most dangerous of all things..." (*Laws*, p. 315).

[12] *Republic*, pp. 259-260.

[13] *Ibid.*, p. 258.

[14] *Ibid.*, p. 248.

[15] *Ibid.*, p. 247.

[16] *Ibid*., p. 285.

[17] *Ibid*., pp. 242; 282.

[18] *Ibid*., p. 282.

[19] *Ibid*.

[20] Plato's limitations on the common motivations for self-aggrandizement fail to account for a 20th Century totalitarian like Adolf Hitler who possessed many minor ascetic virtues including no family ties, no wealth (he declined his official salary), and very little property (only his home in Berchtesgaden). In fact, all Hitler really wanted, as his actions made clear, was "die ganze Welt."

[21] *Republic*, p. 241.

[22] *Totalitarian Dictatorship and Autocracy*, p. 108. It should be pointed out that Friedrich and Brzezinski, in devising this particular characteristic, were primarily concerned with the modern applications of a communication process: the press, radio-television, and motion pictures--forms of which Plato had no conception. However, a strong argument could be made that he would have warmly welcomed them into his "Republic" inasmuch as they tend to be uni-directional, admitting of no immediate feedback or dialectical exchange.

[23] *Republic*, p. 129.

[24] *Ibid*., p. 222.

[25] Plato was keenly aware that state training should begin at an early age when the child was most impressionable. He writes: "You know also that the beginning is the chiefest part of a work, especially in a young and tender thing. For that is the time at which the character is formed and most readily receives the desired impression." *Ibid*., p. 200.

[26] Glenn R. Morrow, "Plato's Conception of Persuasion," *Philosophical Review*, 62 (1953), p. 234.

[27] *Ibid*., p. 238.

[28] *Ibid*., p. 361.

[29] *Ibid*., p. 367.

[30] *Ibid*., p. 201.

[31] *Ibid*., p. 221.

[32] Plato, *Gorgias*, in *The Dialogues of Plato*, Vol., III, trans., Benjamin Jowett (New York: Scribner, Armstrong, and Co., 1878), p. 93.

[33] Plato, *Statesman*, in *The Dialogues of Plato*, Vol. III, trans., Benjamin Jowett (New York: Scribner, Armstrong, and Co., 1878), p. 590. Even though Plato condemned the false rhetoric practiced by the Sophists as merely a "knack of flattery," (*Gorgias*, pp. 47-51 passim), it is apparent that his major

objection in that dialogue was to the absence of what he conceived of as art and system, not to the business of pleasing the audience, as study of his "right rhetoric" in the *Phaedrus* reveals.

[34] Adele Spitzer, "The Self-Reference of the *Gorgias*," *Philosophy and Rhetoric*, 8 (1975), p. 22.

[35] The possibility held out to the lower classes that their children might aspire to greater heights is the theme of the "Myth of the Golden, Silver and Brass Children." See: *Republic*, p. 240. However, Plato would have done his best to circumvent it by allowing the masses to marry indiscriminately while the philosopher-king practiced a rough kind of eugenics with the guardians. See *Ibid*., pp. 282;285.

[36] *Ibid*., p. 285.

[37] *Ibid*., p. 211.

[38] *Ibid*.

[39] *Ibid*., p. 238.

[40] *Ibid*., p. 242.

[41] Even a confirmed apologist for Plato like Ronald B. Levinson [*In Defense of Plato*, (Cambridge: Harvard University Press, 1953), p. 434], admits that the "persuasive art of speech" by which the philosopher-king controlled his cohorts would employ lies in "certain circumstances."

RATIONALE AND DEVELOPMENT OF AN EMPLOYEE RIGHTS SCALE

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Ira Phillips, a District Manager of Goodyear Tire and Rubber Company in Houston who was promoted to an assistant regional manager in Atlanta, testified against his company in a Texas tire antitrust case. He was subsequently discharged. A district court jury found that the real and only reason Phillips was dismissed was "for such testimony" and awarded him $400,000 in compensatory damages. The Fifth Circuit Court of Appeals, however, reversed that decision on the grounds that there was no basis in Texas law for predicting that the state "would adopt 'public policy' exception to the at-will rule."[1]

More recently Richard Hudson, a leader of the 1,700 member Black Workers Alliance (BWA) at IBM and a veteran of 17 years with the company, was fired. Hudson had distributed copies of a wage guideline chart. That chart revealed, he said, that "regardless of how long we'd been with the company, black workers were getting paid...in the lowest quarter [of the pay scale]" The National Labor Relations Board upheld his discharge upon the reasoning that "IBM had the right to maintain confidentiality of its salary information for legitimate business reasons."

The legitimate reasons for salary secrecy hinged upon personnel policy which stated IBM salary increases are not standardized either by timing or amount. Furthermore, supervisors have broad discretion whether to grant increases, when to grant them and in what amount. At the hearing, IBM representatives argued secrecy was needed to maintain high morale and to prevent the competition from hiring away the work force. Over against these "legitimate reasons" was the BWA's need to discover if the 18,000 blacks of IBM's 207,000 employees were being discriminated against in pay.[2]

The public interest and the at-will rule are in conflict; freedom of employee speech and the related concern for employee right to know are at the crux of these legal and ethical controversies. The purpose of this study, therefore, is to present a rationale for and report of development of an employee rights measure of freedom to speak and right to know policies suitable for organizational communication research.

CONTROVERSY OVER THE AT-WILL RULE

In times of slavery and serfdom, a master and lord's authority were unquestioned. But with the evolution of English labor practice, employment came to be presumed to be for one year and could be terminated only for just cause, such as poor performance or unfitness.[3] To some extent this practice was true in the first century of this nation and is the case today within most educational institutions. The at-will rule, however, broke with that tradition in that under it an employer at any time can discharge an employee "for cause, for no cause, or for cause morally wrong."[4] Approximately 100 years ago, Wood, who is given credit for the at-will treatise, stated "that a general or indefinite hiring is prima facie a hiring at will...terminable at the will of either party."[5]

Such a rule was then and is now eminently sound from the perspective of any employer. Moreover, it appears fair because the at-will rule is based upon free will of either party and satisfactory economic exchange. The employee is free to quit; the employer is free to dismiss. The symmetry of the relationship makes it seem equitable. Perhaps, because the at-will rule had a ring of independence and rugged individualism, it came to be accepted in U.S. legislation and case law, or more cynically, it became the rule because those who had the power made the rule and won in court.

The line of argument for an at-will rule is twofold: economic and managerial. Economic efficiency and success are the goals of business enterprise. In a free society, slave labor and exploitation of a work force are out of bounds. The employee, therefore, is free to work or not work, and employers, if they can not compel anyone to work, must be free to employ those who are in their judgment better qualified, and better performers. Employers, saddled with an unqualified or unwilling work force, can not survive. The economic success of a work enterprise depends upon management's ability to secure cooperative effort.

Prerogatives to manage depend upon the ultimate weapon which is dismissal. Management must make judgment calls. Many intangibles go into decisions about performance such as compatibility, working to capacity, and loyalty. There is no question about management's right to decide what are the better physical resources, better technologies, better financing and better marketing. Yet erosion of the at-will rule would limit management's ability to make judgment calls with respect to human resources.

A recent case illustrates the need for an at-will rule and its benefit to a firm. Nationwide Insurance Company asked its employees to obtain signatures favoring no-fault insurance to be forwarded to Pennsylvania legislators who were considering such a bill. One of their employees disagreed with the company's position, refused to participate in the lobbying effort, and privately criticized it. Subsequently, he was discharged. The employee sued that he had been unjustly fired for conscientiously expressing his beliefs and for refusal to carry out a political act. Nationwide secured a summary dismissal in a lower court but lost in the appellate court. The appellate court found the employee had been unjustly fired for exercise of his political rights.[6]

The implications that an employee may not be discharged for defying a legitimate lobbying effort flies in the face of the authority to manage one's own business. Refusing to carry out orders that are in the company's interest and that might also be in the public interest (i.e., no-fault insurance could lower insurance costs), it was argued, should have the support of the at-will rule.

Managers see many restrictions being imposed upon them: collective bargaining laws, safety regulations, equal opportunity rules, environmental agencies. They are worried about the cumulative effect. Ewing says they "worry that management's ability to manage will be weakened, that a fissure will be created which will cause the whole pyramid to tumble down."[7]

Battle lines are being drawn. Those favoring at-will argue that the "giving employees a property right in jobs could easily be extended to build a case for employers gaining property rights in valued workers--that is a case for slavery."[8] Business is becoming legally more savy. To prevent employee awards for wrongful discharge employee policies are more narrowly defined: Employers are advised to "delete any statements in employee handbooks which suggest the company has limited its right to dismiss employees. An at-will statement should be added and lists of causes for discharge should include a statement that they are not inclusive."[9]

The at-will doctrine has been thoroughly reviewed from a legal perspective for both the public and private sector. Sanders, after examination of 200 appellate cases concerning government employment, concluded that free speech in public organizations is unnecessarily more limited than free speech in society at large.[10] And after equal scrutiny of cases brought in the private sector, he stated "Communication in private organizations is often suppressed in ways that would be unconscionable if done by government in society at large."[11]

In numerous policy statements and court tests it has been affirmed that government has no power to restrict expression because of message, ideas, subject matter or content. Even acknowledging the impact of the Hatch Act in limiting political activity of certain federal employees, it would seem, therefore, that public employers should be exemplary in their concern for the constitutional rights of their employees. And in the public sector the courts have sought to balance employee deference to authority and corporate loyalty against freedom of speech.[12] One significant reason for the concern for balance is that it is extremely difficult to determine the degree to which employee critical speech might contribute to inefficiency, and therefore to employer loss. Two reasons underlie this difficulty: (1) the affective causal link between an employee's speech and a superior, coworker or the general public is not easy to establish; and (2) the specific criticism by an employee may well grow out of widespread dissatisfaction.[13]

The argument for protection of employees' right to speak up, even in critical ways, is based upon the notion that an exchange of opinions, even antagonistic opinions, is essential to the marketplace of ideas. From a traditional management perspective, criticism of one's superior threatens organizational authority and group harmony,[14] and tarnishes an organization's public image. Obviously there is some truth to this notion. From another perspective, coolness to employees' criticisms leads to covering up mistakes and to groupthink.[15] The parallel argument that government employee speech, even when critical, is in the public interest is easier to make than for the private sector employee.

Yet the public interest also provides an important rationale for limitation of the at-will rule in the private sector. Both union and non-union employees may more easily win their day in court if they can prove they have been discharged for refusal to engage in a criminal activity or for performing a statutory duty. A finding for the employee most often hinges upon whether the "courts find a clear mandate of public policy."[16]

The Supreme Court has upheld federal legislation surrounding union organizing and bargaining contracts.[17] However, only one in five in the work force belong to unions. Moreover, most unions have not bargained for employees' free speech and privacy. Sanders' review of statutory protection against wrongful discharge has revealed increasing amounts of legislation pertaining to giving court testimony against labor standards, equal opportunity, health and safety, environmental pollution, and political activity; and he concluded "Statutes protecting the communication of employees are embedded in a bewildering variety of legislation and offer a confusing assortment of enforcement mechanisms."[18] Such laws provide some recourse for the discharged whistleblower, but more often than not those who go public are unsuccessful in regaining their jobs and they suffer emotionally as well.[19]

Most industrialized countries have enacted laws which seek to protect employees from unjust dismissal, specifically, Great Britain, France, West Germany, Denmark, Japan, Italy, Norway, Sweden and Canada.[20] In Norway and Sweden employees have a qualified right to criticize wrongdoing and waste. In Japan, New Zealand, Australia and other countries privacy is an employee right. The argument that industrial inefficiency and lowered productivity will result from guaranteeing employee freedom of speech does not appear so impressive when one learns that some of the countries which have productivity superior to the United States also have restrictions on the at-will doctrine.[21]

Critics of the current practice have challenged the wisdom of such authoritarian policy and practice. David Bell, a socio-philosopher of the post industrial revolution, charged that "The average workplace is an unrelenting dictatorship."[22] The idea of insidious subjugation of the individual to the organization captured the public attention in such works as William H. Whyte's *The Organization Man*, Chris Argyris' *Personality and Organization*, Robert Townsend's *Up the Organization*, and Rosabeth Moss Kanter's *Men and Women of the Corporation*. Ewing documented many personal tragedies resulting from unjust dismissal (as many as 500,000 annually) and he states that worker rights are the "critical communication issue of 1984."[23] He and others have proposed that a Bill of Employee Rights is needed to protect employees from encroachment of basic rights.[24]

Communication variables have been the foci of many organizational studies.[25] It seems reasonable to hypothesize that the extent to which human dignity, freedom of speech and concern for privacy are organizational matters of policy and practice will and does affect job satisfaction, employee commitment, product innovation and quality, and output. However, linkage among such independent, intervening and dependent variables has received little attention. Most of the scholarly attention to employee rights has been of a case study and legal character.

This study, therefore, [illegible] an attempt to develop a valid and reliable measure of perceptions of organizational policies and practices relevant to individual employee rights of freedom of speech and right to know. If such a measure is possible and practical, then causal linkage to important organizational outcomes may be undertaken.

Study of the literature presented above and our work within employing organizations led us to believe that a Bill of Employee Rights, if ever one were to be written, would entail many communication-related activities.

Consequently, the items which made up the scale concerned policies about, attitudes toward and practice with respect to the at-will rule, use of employee records, sexual harassment, channels for criticism, arguing, performance appraisal, and restrictions upon dress, grooming and political activity.

In light of these considerations, an Employee Rights Scale was developed and tested. Two hypotheses and one research question were then formulated:

H_1: Employees who are in management will have the more favorable perceptions of how their organizations deal with employee rights.

Rationale:

Subordinates feel more powerless, more oppressed. People in management feel more in control, are more ego-involved in administering processes which encompass the rights; thus they would be less likely to admit that rights are violated. Management may have more favorable perceptions of employee rights in their organization as an ego-defensive function, i.e., to protect self from the perception that one must repress others in order to maintain control.

H_2: Employees with the most years of employment will have the more favorable perceptions of how their organizations handle employee rights.

Rationale:

Violations of rights produce dissonance, or cognitive inconsistency. Consistency theory would predict that a person could reduce the inconsistency in one of several ways. One would be to leave the organizaiton. Or if the person stayed, he would find a way to reduce the dissonance (e.g., lower the importance of the violated right). In any event consistency theory would predict the longer one stays in the organization the more likely it is that he or he has come to resolve, or rationalize, violations of rights.

Research Question: Is the size of an organization related to how employee rights' violations are perceived?

A prediction did not seem warranted because of competing expectations. Large organizations could be considered more impersonal, less caring, and thus they violate rights more. However, a competing notion would be that large organizations have developed more formalized procedures for dealing with people and thus keeps violations of rights below that of smaller organizations where less rigidity in procedures also allows management more freedom to be discretionary and despotic.

METHOD

Subjects

Subjects were 300 employees in approximately 260 different work organizations. Approximately one-third of the subjects were college-age students enrolled in communication courses who were currently employed. The two-thirds were older employees not enrolled in college. The subjects were employed in many different kinds of organizations including: eating places, retail stores, manufacturing, government, financial, educational and medical institutions. These employing organizations were located within a 50 mile radius which includes nearly five million population in the midwest.

Item generation

Items for the scale came from 12 corporate policy handbooks and statements, free speech cases decided in the courts, union literature, interviews with 30 employees and literature cited.[26] A 45 item original version of the scale[27] was administered to nearly 100 employees. As a result of this pilot administration, several items were reworded or deleted. The 33 item scale described in this investigation was thus formed.

Procedures

College-age subjects were told that a study of policies and practices was being done of places of employment in this region. Subjects were advised that all information was anonymous and that their honest opinions about their present work places were sought. They then were asked to indicate their degree of Disagreement to Agreement on the five point scale before each item and to preface each item with the phrase "In my place of work..." A faculty trained research team of six persons followed the same administrative protocol for the non-college population.

RESULTS

Subjects' responses to the 33 items designed to measure employee rights were factor analyzed. A principal components analysis was conducted first. A scree test[28] indicated the probably existence of two significant factors. The criteria set for a significant factor were that at least three items had to load on the factor with primary loadings of at least .50 and secondary loadings no higher than .30.

Two factors were then extracted by a Varimax rotation. Ten items loaded on the first factor and seven items on the second. However, an examination of these items revealed all of the items which loaded on the first factor were worded positively, while all of the items which loaded on the second factor were worded negatively. Thus, the factor structure appeared to be a function of item wording, rather than the content of the items, and the scale therefore was considered unidimensional.

These 17 items were selected for the final scale. Three additional items, one positively worded and two negatively worded, were also selected. Each loaded at least .48 on one factor and no more than .08 on a secondary factor. These items were added to increase reliability, and also to increase the span of employee rights' issues covered in the scale. A 20-item scale, it was decided, represented economy in terms of administration time, but was of sufficient length to achieve satisfactory reliability. Coefficient alpha[29] for responses to the 20-item scale was .85.

The items, along with their factor loadings, are presented in Table 1.

TABLE 1

THE EMPLOYEE RIGHTS SCALE*

Preface each item with: In my place of work...

Item		Factor I	Factor II
1.	there is a well publicized bill of employee rights.	.49	-.05
2.	an employee is told what is in her/his file.	.61	.02
3.	the organization forbids or discourages employees from outside activities which are political or controversial.	-.04	.48
4.	the employer claims the right to discharge an employee for good cause, or for no cause.	.08	.48
5.	employees can find out how records about them are being used.	.62	.06
6.	the organization imposes unreasonable restrictions upon employees' dress and grooming.	-.01	.51
7.	an employee who speaks publicly about alleged illegal behavior of management will be terminated.	-.01	.50
8.	employees may correct or amend an inaccurate record.	.62	.01
9.	management wants to keep employees gagged.	.29	.62
10.	difference of opinions are freely voiced.	.60	.22

TABLE 1 (continued)

Preface each item with: In my place of work...

Items		Factor I	Factor II
11.	sexual harassment is practiced.	.18	.54
12.	employees do not have to go public with criticism because there are internal channels for communication.	.57	.23
13.	performance appraisals are conducted in a professional, confidential manner.	.63	.17
14.	employees are afraid to disclose mistakes and therefore cover them up, or keep quiet.	.21	.55
15.	it is understood one should not argue a point vigorously.	.30	.62
16.	there are communication channels through which an employee may confidentially submit complaints, comments, or questions.	.56	.05
17.	an employee is expected to review the annual written evaluation of his or her work and may add comments if so desired.	.54	.05
18.	management is equally concerned about ethics as it is about productivity.	.56	.19
19.	superiors seem to feel criticism is a personal attack.	.25	.50
20.	there is a workable system by which an employee may appeal an immediate superiors' actions to higher management.	.57	.09

*Response format: five point scale, with "strongly agree" and strongly disagree" endpoints.

The first hypothesis, which pertained to the validity of the scale, was that employees who are in management would have the more favorable perceptions of how their organizations deal with employee rights. In order to explore this, a sum of responses to the 20 items was computed for each subject and the total scores were submitted to a one-way analysis of variance with two groups, management (n = 84) and non-management (n = 214). The result was significant, *F* = 22.43, p<.001, *df* = 1/296. The perceptions of management (x = 72.18) were more favorable than those of non-management (x = 65.15). The means are presented in Table 2. This result supports the first hypothesis.

The second hypothesis predicted that employees with the most years of employment would have the more favorable perceptions of employee rights. The means are presented in Table 3.

TABLE 2

EMPLOYMENT LEVEL

Level	N	X
Management	84	72.18
Non-Management	214	65.15

TABLE 3

YEARS OF EMPLOYMENT ANALYSIS

Years of Employment	N	X
<1	80	65.26
1-3	97	66.52
4-6	34	64.82
7-10	24	70.00
> 10	63	70.86

The analysis of variance was significant, $F = 2.82$, $p<.03$, $df = 4/293$. There was a significant linear trend in perceptions of employee rights when subjects were classified according to years of employment, $F = 8.95$, $p<.01$. There was not a significant deviation from linearity, $F = .78$. Moreover, perceptions of employee rights for subjects with seven or more years of employment ($x = 70.62$) were more favorable than subjects with fewer years ($x = 65.77$), $t = 3.23$, $p<.01$, $df = 296$. These results, therefore, support the second hypothesis.

A prediction was not posited for relations between employee rights and organizational size. Analysis of variance suggested the differences among the four groups were not significant, $F = .69$. The respective means for subjects from organizations with 1-20 employees, 21-100, 101-500, and >500, were 67.98, 66.36, 66.41, and 69.00.

However, an inspection of the group means for each of the 20 items revealed apparent variability which may have been masked by the test of the sums of the 20 items. That is, employees from smaller organizations seemed more favorable on some items while employees from larger organizations were higher on other items, i.e., a canceling effect which equalized means. A discriminant analysis was conducted to test that possibility.

The results revealed that when the 20 items were weighted differentially, the centroids for the four groups were significantly different, Wilks'Λ= .64,X^2 = 128.1, df = 60, p<.001, eigenvalue = .35. The centroids are presented in Table 4. The weights (standardized coefficients) for the 20 items which allowed the four groups to be distinguished optimally are presented in Table 5. The structure coefficients are also presented in Table 5. A structure coefficient is the correlation between the standardized score for a variable and the linear composite of all of the variables. Thus, a structure coefficient indicates the extent to which a particular variable measures what is measured by the discriminant function.

TABLE 4

ORGANIZATIONAL SIZE ANALYSIS

Number of Employees	N	Centroid*
1-20	91	-.43a
21-100	87	-.38a
101-500	80	.51b
>500	39	.81c

*Pairs of centroids which have different subscripts were significantly different according to F tests, based on Wilks' Λ dfs = 20/274, ps <.05.

TABLE 5

DISCRIMINANT COEFFICIENTS

Item	Standardized Coefficient	Structure Coefficient
1	.48	.34
2	-.12	.05
3	-.04	-.13
4	.39	.30
5	-.05	-.14
6	.19	.07
7	.13	.09
8	-.53	-.22
9	-.01	-.07
10	-.48	-.32
11	-.33	-.16
12	-.04	-.02
13	.24	.16
14	-.05	-.06
15	.07	-.10
16	.06	.01
17	.29	.25
18	.00	-.02
19	-.34	-.26
20	.52	.32

The results suggested some differences in perceptions of employee rights which may have been a function of the size of the organization. Employees from larger organizations tended to agree more that there is a well publicized bill of employee rights, that comments could be added to the annual evaluation, that there is a system for appealing an immediate superior's actions, and they disagreed more that their employer claims the right to discharge an employee for good cause or no cause. Employees from smaller organizations, on the other hand, agree more that they could correct inaccurate records, that differences of opinion are freely voiced, and disagreed more that sexual harassment is practiced, and that superiors feel criticism is a personal attack.

DISCUSSION

The purpose of this research report was to present a rationale and developmental test of an employee rights measure. Rationale for attention to employee rights rests upon a chain of thought: (a) that traditional corporate prerogatives and employee rights conflict, (b) that application of the at-will rule creates a destructive, chilling effect, depriving the workplace of communication rights granted in the society at large, (c) that new understandings, policies, rules and laws should be created to make the workplace one in which comunication rights are realized, (d) that corporate attention to employee rights need not seriously impair management and productivity and (e) that corporate attention to employee rights could result in a management-employee climate which would benefit from less cover up of mistakes and need for whistle-blowing.

The degree of attention to employee rights is a matter of corporate attitude, policy and practice. Policies both create and reflect normative management attitudes and practice. The degree to which employees perceive that their constitutional and ethical rights are protected or restricted where they work, one would assume, should influence job satisfaction and organizational commitment.

The employee rights scale developed and tested provides some indication that this is the case. Those who were in management as compared to non-management positions were of the opinion that their places of work had attended to employee rights. That is reasonable in light of the fact that those at higher levels have more say in making and implementing the rules. Their communicative rights are more assured and less restricted. It seems reasonable, too, that their desire to be a part of an organization that does respect employee rights might be reflected in their responses.

This research did not compare the degree to which union and non-union employees perceive that their rights are realizable in the workplace. Ewing argues that the largest part of the work force is non-union (engineers, scientists, computer programmers, sales people, secretaries, accountants) and that these are "the very types of people who feel they are not being accorded full stature as human beings unless they are able to enjoy rights to due process, conscientious objection, privacy and other civil liberties."[30] Further research, now more possible with an employee rights scale, can ascertain, if indeed, union personnel believe they have more or less of these rights than non-union personnel.

Finally, it is the suggestion of this research team that those who seek to discover what are the important variables affecting organizational communication should not neglect the domain of employee rights. The causal links are yet to be established. However, enough has been done to point a direction and to challenge the conviction that communication-related rights within the work crucible will reflect and may affect employee tenure, satisfaction, innovation, commitment and probably the bottom line. This will be even more an issue if computer monitored and paced work becomes the norm.

ENDNOTES

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4. Martin v. Platt (1979) 386 NE 2d 1026.

5. Feinman, "Development," 125.

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9. "Business Bulletin: Discharge Liaibilities," *Small Business Report* 8 (November, 1983), 12.

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12. See, for example, L. Blades, "Employment At-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," *Columbia Law Review* 67 (1967), 1403-1435; K. Walters, "Employee Freedom of Speech," *Journal of Industrial Relations* 15 (February, 1976), 20-43; and S. Estreicher, "At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response," *New York State Bar Journal* 54 (1982), 146-149, 170-175.

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16. Sanders, "Erosion," p. 5.

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18. W. Sanders, "Curbing the Employer's Power to Suppress Communication: A Review of State and Federal Statutes Protecting the Comunication of Private Sector At-Will Employees." Paper presented at the annual convention of the Southern Speech Communication Association, Baton Rouge, LA, April, 1984, p. 22.

19. See, for example, L. H. Orr, "Is Whistle-Blowing the Same as Informing?" *Business and Society Review* 39 (1981), 4-18; L. P. Stewart, "'Whistleblowing': Implications for Organizational Communication," *Journal of Communication* 30 (1980), 20-43; and D. Ewing, *Do It My Way Or You're Fired! Employee rights and the Changing Role of Management Prerogatives* (New York: John Wiley and Son, 1982).

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22. D. Ewing, *Freedom Inside the Organization*, (New York: E. P. Dutton, 1977), p. 55.

23. Ewing, *Do It My Way*, and Ewing, "Worker Rights," 34.

24. Ewing, "Employee Rights," 104-105.

25. Viz: H. Dennis, G. M. Goldhaber, and P. Yates, "Organizational Theory and Research: An Overview of Research Methods," in B. Rubin (Ed.), *Communication Yearbook 2* (New Brunswick, NJ: Transaction Books, 1978), pp. 243-270; and M. Pacanowsky and N. O'Donnell-Trujillo, "Organizational Comunication as Cultural Performance," *Communication Monographs* 50 (1983), 126-147.

26. See Walters, "Employee Freedom"; Ewing, *Freedom*: and Ewing, *Do It My Way*.

27. W. I. Gorden, "Toward Development of an Employee Rights Scale," in *Free Speech Yearbook 1978*, (Falls Church, VA: Speech Communication Association, 1978), pp. 119-124.

28. R. B. Catell, "The Scree Test for the Number of Factors," *Multivariate Behavioral Research* 1 (1966), 245-276.

29. L. J. Cronbach, "Coefficient Alpha and the Internal Structure of Tests," *Psychometrika* 16 (2952), 297-334.

30. Ewing, "Worker Rights," 35.

FREE SPEECH, THE MASSACHUSETTS BAY COLONY, AND ITS PROBLEMS WITH COVENANT AND RHETORICAL DEVIANCE

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With a concern for the historical essentials in the study of free speech, John Lee Jellicorse noted in 1972 the unequal emphasis given to law and philosophy over history. He exclaimed that "if free speech is not to perish, a knowledge of its historical development must live in the hearts of men and women." "Unfortunately," he concluded, "the materials for the study and teaching of a full history of free speech are incomplete."[1] A perusal of the published research since Jellicorse's observation over a decade ago tends to confirm that the emphasis has changed little and the historical record remains incomplete. For the history of free speech in the United States, one of several possible beginnings lies within the early settlements of New England.

Governor John Winthrop and his compatriots of the Massachusetts Bay Colony unwittingly provided a microcosmic view of a moment when people struggled with values in organizing a new social order. That moment in history should inform one about cultural forces that have potential to emerge in any society affecting a restraint on free and open expression. This study reviews two events from the early seventeenth-century history of the Massachusetts Bay Colony, namely, the Roger Williams conflict and the Antinomian controversy, in order to note the circumstances in which free speech was suppressed. In addition, it describes the concept of covenantal theology with the purpose of identifying a rationale, albeit an unfortunate one, for the controlled theocratic society that characterized the Bay Colony. Finally, it describes the rhetorical genres or patterns of discourse that characterized the speaking of both the majority ministers and the minority who dissented, with the purpose of suggesting that free speech was lost in a conflict over both substantive issues and rhetorical modes of expression. The study concludes that free speech was lost when anyone (1) violated the covenant that guided the original settlement and (2) deviated from the rhetorical patterns in discourse that colonists customarily heard.

A Search for Justice

After the death of Elizabeth I in 1603. English reformers hoped that with a new Calvinist monarch from Scotland, James I, the reformation of religion might continue with increased devotion. When in 1604 the Hampton Court conference accomplished little for reformers beyond authorizing a vernacular translation of Scripture, their hopes for a continuing reformation in England languished.[2] The Pilgrim separatists emigrated in 1609 from Scrooby, England, to Leyden, in the Netherlands, and after a decade among the Dutch, they feared their children's assimilation and chose once again to emigrate to Virginia. Having recruited strangers from England to join their company, they found themselves a minority aboard ship. Marshall Smelser observes that in their attempt to escape a disorderly political and religious world in Europe, the settlers "brought disorder with them."[3] These pilgrims who crossed the stormy North Atlantic aboard the Mayflower and settled at Plymouth in 1620 accomplished little beyond their survival during the next several decades.

When James I died in 1625 and Charles I assumed the monarchy, English Puritans continued to experience frustrations over their lack of power to reform further the Anglican Church. By 1629, some reformers looked toward New England to find a more compatible environment. Their vision was not solely to escape persecution; the oppressive era of Archbishop Laud still lay ahead.[4] When in 1630 John Winthrop and four-hundred colonists readied themselves to board ship for Massachusetts Bay, John Cotton preached their departing sermon. He alluded to several reasons for their emigration that ranged from better using one's talents to conducting business. When Cotton spoke of emigration to obtain "the liberty of ordinances," he referred to the oppressive days of Queen Mary. He urged listeners to attend to their responsibilities as missionaries to the Indians and to "be not unmindful of our Jerusalem at home."[5]

On the deck of the flagship Arbella in the middle of the Atlantic, John Winthrop expressed the basic values motivating his own settlement at Massachusetts Bay. In a lay sermon entitled "A Model of Christian Charity," and described by Perry Miller as "a fundamental document for comprehending the Puritan Mind," John Winthrop preached to his charges and eloquently summarized their work, saying, "We shall be a a city upon a hill; the eyes of all people are upon us." Winthrop's concern was to establish in the New World a model of the Christian society, government, and church that seemed so illusive to Puritans on native English soil. For reasons both consistent and sometimes in conflict with John Winthrop's, over a thousand other settlers joined the Bay Colony in 1630, and in the next twelve years from sixteen to twenty thousand more. For whatever reasons they came, they became part of an experiment aimed at establishing a society in which Winthrop hoped "justice and mercy" would prevail.[6]

While a variety of forces influenced the Bay Colony during its first decade, the clergy and their convenantal theology were significant factors that shaped colonists' thoughts on community and government. Although Francis J. Bremer observes that early settlers initially struggled "to adapt the governing mechanisms of a commercial company to the needs of a civil colony," Winthrop J. Hudson notes that their Reformed faith enabled them to envision a levelling in church and society that encouraged broader participation in governance.[7] And when the Colony began to face an exodus of settlers from towns to outlying farms, Bremer observes that leaders were also anxious over rumors that additional sectaries were planning to migrate from England.[8] With these factors and others no doubt affecting life and thought in the early settlement, colonists turned to their meetinghouses each week where clergymen reinforced the covenantal values that held their community together.

The Roger Williams Conflict

Roger Williams' early life in England followed a path taken by other settlers of the Massachusetts Bay Colony.[9] Among his early acquaintances were men of prominence in the Puritan history of both Old and New England. As a youth he attended church with Sir Edward Coke, who saw promise in Williams and supported him as patron while he attended school at Sutton's Hospital and at Cambridge, where he also became acquainted with Oliver Cromwell. He knew John Winthrop before both emigrated to New England. He matriculated at Pembroke College, Cambridge, in 1623, and remained to study for the ministry until 1628, when he accepted an appointment as chaplain to Sir Edward Masham at Otes in Essex. While at Cambridge, Williams undoubtedly listened to many of the same lecturers and preachers heard by other Puritans, but his response was to develop a more liberal philosophy about government and popular rights.[10] In December 1629, Williams married on rebound after first experiencing a frustrated romance, and a year later he and his wife went to Bristol and sailed for New England. Williams apparently felt pressures from the increasingly autocratic rule of Charles I, who encouraged the preaching of doctrines that supported monarchy and bishop and discouraged popular rights. Williams landed in Boston on February 5, 1630/31, after sixty-five days on stormy seas, and his arrival was noted with some enthusiasm in the writings of several who welcomed him to the Bay Colony.[11] Historian James Ernst comments that in his emigration from England, Williams "escaped from this tyranny of religious thought and civil authority, only to find similar outrages inflicted upon conscience and human rights in New England by men who, like him, had suffered in Old England."[12]

During the next four years the Puritan leaders of the Massachusetts Bay Colony struggled to bring Williams into conformity.[13] Soon after arriving in early 1630/31, Williams refused an offer as teacher to the Boston church, which he subsequently agitated by asserting that God required no conformity of religion, that magistrates should not punish persons for ignoring religious services, and that he should not share communion with the Boston church, whose members had earlier held communion and had not rejected impurities within the Church of England. After several weeks he accepted an offer as teacher with the Salem church, whereupon the Massachusetts General Court, in violation of congregational autonomy, expressed disappointment and asked Salem not to accept him.

During the next six months at Salem, between April and September 1631, Williams met continued opposition from Boston and afterwards left Salem for the Plymouth settlement, where he was admitted to the church and served as minister for two years. Eventually his differences became apparent to William Bradford and the Plymouth church, and in September 1634 he was dismissed. The Salem pastor died the month before and Salem happily received Williams back as pastor, but again not without protests from Boston.

In November 1634, the General Court prepared various civil and religious complaints and summoned Williams for inquiry. New accusations were prepared in April 1635, and in July the General Court acted to punish Salem by withholding lands legally belonging to the villagers. Roger Williams proceeded to write letters asking other churches in the Colony to oppose the General Court. However, by fall 1635, Williams' support within the Salem church eroded when members preferred him less than the securing of their lands. Williams renounced communion with Salem and all churches of the Bay Colony, whereupon the General Court summoned him to give Thomas Hooker occasion to deliver a rebuke. John Winthrop was disappointed that Hooker could not "reduce him from the error of his way," and on September 3, 1635, the General Court convicted Williams of both civil and religious misdemeanors and ordered him to depart within six weeks from the jurisdiction of the Massachusetts Bay Colony.[14] The time was later extended till spring, but when Williams continued to influence others, the Court prepared to arrest and return him to England. John Winthrop may have warned him, and in January 1635/36 Williams left Salem. By eary summer he founded Providence, where he hoped his principles of toleration and liberty might prevail.[15]

Williams later recalled those trying months when he labored "trice a week" with the Salem church, worked at his farming, and traveled "day and night to court," reporting that "it pleased God to bring me neare unto death, in which time... I was unmercifully driven from my chamber to a winters flight."[16] In 1651 Williams wrote John Endicott at Boston, arguing that the authority of civil government should have no place in matters of religion and conscience. "Sir, I must be humbly bold to say," he wrote, "that it is impossible for any man or men to maintain their Christ by their sword and worship a true Christ!" Williams believed people who fought "against God in some of them," and he pleaded for "a moderation toward the spirits and consciences of all mankind merely differing from or opposing yours with only religious and spiritual opposition."[17]

The Antinomian Controversy

Occurring between 1636 and 1638, the Antinomian controversy centered around Anne Hutchinson, the wife of a deputy from Boston to the Massachusetts General Court.[18] After establishing a reputation for herself as an advisor and nurse among neighborhood women, Mrs. Hutchinson held meetings in her home for the purpose of discussing local ministers' sermons. The meetings gained considerable popularity, eventually included men, and consisted of some sixty or more persons in regular attendance.

In her meetings Mrs. Hutchinson apparently advocated a theology she attributed to her own minister, John Cotton, and to her brother-in-law, John Wheelwright. Both men came to Boston after having lost their pulpits in England as a result of their Puritan preaching. With the exception of Cotton and Wheelwright, Mrs. Hutchinson believed most ministers in the Colony taught a doctrine that connected a person's works with redemption, that sanctification, or the living of a religious life, was evidence of justification or redemption in Christ. Ministers who were the object of her criticisms questioned her own orthodoxy and that of John Cotton, whom they thought inspired her opinions, and in October 1636 they gathered for a private conference with Cotton, Mrs. Hutchinson, and John Wheelwright and achieved a consensus among persons. But after a quarrel over an attempt by some to secure Wheelwright in the place of John Wilson as minister of the Boston church, the ministers, Cotton, Mrs. Hutchinson, and Wheelwright met again after two months and found themselves in sharp conflict. When the ministers asked him about sanctification, Cotton suggested that if taken wrongly as evidence of justification, sanctification could amount to a "covenant of works." Mrs. Hutchinson's response was direct to the point that she charged ministers present with preaching "works" and not "grace." Governor Henry Vane threatened resignation and departure over the controversy, although he supported Mrs. Hutchinson and asserted that ministers were to blame for the Colony's troubles. John Wilson spoke for the ministers when he placed "the blame upon these new opinions risen up amongst us, which all the magistrates, except the governor and two others, did confirm, and all the ministers but two."[19] Unable to resolve the conflict, and hoping still that repentance would restore peace, the General Court announced a fast for the next month on January 19, 1636/37. A fast-day sermon by John Wheelwright only intensified hostilities. He gave opponents no comfort when he marked the lines between his party and the majority, claiming, "The saynts of God are few, they are but a little flocke, and those that are enimyes to the Lord, not onely Pagonish, but Antichristian, and those that run under a covenent of works are very strong: but be not afrayd, the battle is not yours but Gods...."[20] In subsequent days, Wheelwright's sermon inspired other Antinomians to intensify their campaign against clergymen by publically questioning them about their sermons, until "it began to be as common here to distinguish between men, by being under a covenant of grace or a covenant of works, as in other countries between Protestants and Papists."[21]

When the General Court met again on March 9, 1636/37, Winthrop, the ministers, and their party possessed full control. After endorsing an earlier sermon by John Wilson, the Court questioned Wheelwright about his fast-day sermon, and after concluding that he indeed aimed his attacks at them, they found him guilty of "sedition and contempt of authority" for having "stirred up the people to contention, and that with more than ordinary vehemency," and for having "purposely set himself to kindle and increase" bitterness in the colony."[22]

At the next meeting of the General Court, the freemen restored Winthrop as governor in place of Vance. Concurrently with Court proceedings, ministers met with Cotton and again found themselves in agreement. At Cambridge in August 1637, they met in special synod to identify and refute ninety errors among Antinomians and to warn that continued abuse of the liberties to question a minister and to hold private meetings would result in their curtailment. In November sessions of the General Court, Governor Winthrop and a majority of freemen concluded that "two so opposite parties could not contain in the same body, without apparent hazard of ruin to the whole," and they proceeded to disfranchise and banish from the colony Mrs. Hutchinson and other leaders of the Antinomian party.[23]

Covenantal Theology

Both Roger Williams and Anne Hutchinson arrived at their peculiar roles in New England after years of devoted study of Scriptures, and although each acted out of conviction that he or she was preserving a covenant with God higher than any with man, they nonetheless encountered the consequences of having violated a peculiar covenant binding men in their relation to God. Puritan thought centered around covenantal theology, a concept rooted deeply in Old Testament literature, in the Law of Moses, and expressed in the New Testament as a Covenant of Grace. Adam and his descendants sinned against God, and before this breach between man and God could be transcended, God necessarily offered a covenant, such as the Decalogue, that expressed the circumstances whereby man might experience reconciliation.[24] A reader of early New England sermons will likely be struck with the unexpected focus that Puritans maintained on Old Testament literature. That focus occurred because it was in the Old Testament that Puritans found the metaphor they needed for describing both spiritual and secular relationships. Their spiritual covenant in Christ occupied much Puritan thought, but the Old Testament concept of covenant provided a perspective and metaphor through which Puritans spoke of many affairs that were not spiritual but secular.

While speaking to his fellow emigrants aboard the Arabella, John Winthrop described personal values that ideally characterized participants on the voyage, his point being that each was committed to others by covenant to maintain such values once they settled in the New World. Having described several basic premises of Christian conduct, Winthrop next reminded people that after their arrival (1) "the care of the public must oversway all private respects by which not only conscience but mere civil policy doth bind us; for it is a true rule that peculiar estates cannot subsist in the ruin of the public," and (2) "the means whereby this must be effected are...a conformity with the work and the end we aim at." Finally, Winthrop confirmed the covenant's existence, saying, "Thus stands the cause between God and us: we are entered into a covenant with him for this work; we have taken out a commission." Winthrop was confident of God's part in the covenant, saying, "we shall find that God of Israel is among us,...when He shall make us a praise and glory that men shall say of succeeding plantations: 'The Lord make it like that of New England.'"[25]

Roger Williams' and Anne Hutchinson's part in this covenant became clear to colonists when they realized dissent was evidence of a lack of conformity and consequently a demonstration of man breaking his covenant within the community and with God. The dissenters' problem with the Bay Colony was not especially a lack of democratic governance but rather a governance premised on conformity in pursuit of a noble community goal, embodied in the covenant and not on the preservation of personal rights.

A Conflict in Rhetoric

A review of the controversies surrounding Roger Williams, Anne Hutchinson, and her brother-in-law, John Wheelwright, shows that free speech was denied in the Massachusetts Bay Colony, and this conclusion possesses irony in light of the extraordinary amount of speaking, preaching, listening, note-taking, and sermon reading that went on in the Colony.[26] While Bay settlers had occasions to hear numerous public statements during the early years of the Colony, those statements possessed a conformity and a commitment to the covenant that the leadership espoused. Obviously, much public speaking occurred among freemen and preachers, and these were men who recognized the covenant that John Winthrop spoke about while aboard the Arabella. As long as speeches remained within the substantive bounds that characterized that covenant, public discourse remarkably flourished.

But Williams and Wheelwright created a rhetoric that deviated from what fellow colonists expected to hear from their pulpits. Of some 258 speeches and sermons about which some records exist, speeches from the early years of settlement at Massachusetts characteristically took on the quality of expository discourse. However, Williams' and Wheelwright's rhetoric was hortatory or imprecatory in nature.[27] Within these seventeenth-century speeches, expository discourse revealed a minimum effort to produce belief, sometimes appearing to be only an interchange of information. The occasion was ordinary and ritualistic, and the message's temporal focus was primarily in the past. Characters within the message were fixed and fated. The speaker endeavored to make his message remembered, and the speech was often characterized by persistent repetition at points of division rather than by reasoned argumentation. The message could usually be trimmed to order more or less casually without any revision of its overall internal organization. It was frequently given in a series of presentations. Its style was diffused, usually in the manner of an equation and a series of parallel terms, often exhibiting some common element of form. The structure was ordinarily apparent or even bold. The message developed at a high level of abstraction, primarily through textual exegesis and with a thorough biblical orientation. The speech stood forth on its own in an immediate social vacuum. It was distinctively contextual, self-enclosed, non-referential, and intramural in substance. The speech sustained the listener firmly within the bounds of the message itself, obligating him to create in his own mind the world to which the speech related. Although it may have been partially aimed at dissuasion, the speech had an objective tone that projected a sense of speaker detachment. This detachment tended to minimize the significance of source credibility in reception of the message. The overall rhetorical effect was that a subject be regarded in a certain way. The speech itself tended to be functional in nature, didactic, instructive, informative.

Speech-making of this genre is not the rhetoric out of which controversy grows, because there is little one could have complained about--except that it oftentimes made for dry discourse--or sought to suppress. Rather, for the Bay Colony, it was a rhetoric for an audience that felt inwardly and quietly an intense commitment to the values that gave its peculiar identity. This was discourse for emigrants who risked lives and fortunes for the opportunity to create their own peculiar church and society; it contrasted with the hortatory and imprecatory sermons of subsequent years, jeremiads aimed at hearers whose affections waned, who found their ideals less in reforming religion and more in farming and trading.[28]

In addition to the substantive issues, this contrast in rhetoric was what placed Roger Williams and John Wheelwright in the conspicuous roles of public antagonists. Their rhetoric approached the patterns of hortatory and imprecatory discourse that other ministers would not assume until later years when they believed the people had turned from their original goals. Imprecatory discourse was distinctly referential, occasional, and highly social. Its referent lay quite literally in a social context or public occasion, and the occasion was ordinarily of greater significance than most speaking occasions. The speech often pointed to real events, characters, and moral or theological problems, and the response itself was ritualistic. Assuming a unique communal moment, the message's temporal focus was primarily on the present and future. It sought to create a sense of community among hearers or to call attention to one that was lacking. In contrast to expository discourse, where the speaker submitted himself more to the dictates of his subject, the imprecatory speaker exerted greater control over his materials, creating a series of recurring themes from prevailing ideas within the unique social context. The speech was primarily subjective in tone, though possessing greater concreteness in development through the use of comparisons and examples, especially from contemporary or familiar settings, and through less use of allegory. The message pivoted on a loftly principle which in the social context may have appeared threatened. The speaker shaped his argument out of familiar cloth rather than anything like exposition, especially instruction in difficult or novel matters. The speaker did not seek so much to induce anyone to remember the parts of his argument as to invoke concurrence. Though perhaps offering a relatively reasoned pattern of thought, the speech moved through referential immediacy and emotional intensity to create a climax. In construction the speech was highly organic, though its visible structure was occasionally lax for the sake of uninterrupted fluency. Employing stimulating suspensions with prominent subordinating constructions, the style created a constant sense of progress and climax. With an unusual degree of speaker involvement, the speech revealed a highly self-conscious performance and required substantial source credibility for acceptance by the audience.

With an imprecatory rhetoric that was at odds with the norm of the times, Williams and Wheelwright failed to conform not only with the philosophical or theological issues but also with the rhetoric through which they expressed their ideas. They not only offended the religious traditions of colonists but they clashed with the usual rhetorical patterns in a discourse that was subjective, referential, and immediate, one that convinced ministers and freemen alike that they should be treated as strangers and expelled. It was for this same reason that John Cotton, though repeatedly credited with providing the inspiration from which Anne Hutchinson and John Wheelwright both acquired their peculiar theology, was nonetheless able when queried by fellow ministers to maintain his high reputation. He preserved an expository discourse that enabled his sermons and other responses to fit the pattern of preaching his examiners were comfortable hearing in the Colony.[29]

This study of reasons why the Bay Colony suppressed free speech reveals cultural forces in convenantal theology and in the deviant rhetoric of imprecatory discourse that prompted authorities to respond without toleration to dissenters. Migrating to escape pressures from the increasingly suppressive rule of Charles I, Roger Williams asserted that God required no conformity of religion, and colonial authorities struggled to bring Williams into conformity or to silence him. After preparing civil and religious complaints against him, the General Court punished Salem settlers for supporting Williams, and it convicted him of misdemeanors and ordered his expulsion from the Colony. After initiating discussions of sermons in her home, Anne Hutchinson created a controversy that placed her, John Cotton, and John Wheelwright under the critical scrutiny of ministers and the General Court. Although Cotton escaped the harsh judgment of ministers who found him in conformity, the General Court convicted Wheelwright for "stirring up the people" in a fast-day sermon and ordered Hutchinson and her followers banished from the Colony.

Reacting intolerantly to these dissenters, Colony authorities adhered in policy to a tenet of convenantal theology that required public matters to transcend all private concerns. They concluded that a private concern should not subvert a public one, and they failed to value the individual rights of dissent and free speech, insisting instead on a covenant of conformity to assure success in their experiment and with it the praise of God and Englishmen for the Colony. While recognizing the experimental nature of their settlement, Bay Colony clergymen and freemen produced such preaching and speaking that possessed a conformity and commitment to the covenant. However, Roger Williams, who argued for freedom of expression, and John Wheelwright, who represented Hutchinson's Antinomian dissent, departed from the familiar modes of expression in exository rhetoric. They used an imprecatory rhetoric that was rooted in occasion and events, where lofty principles appeared threatened within the social context, a rhetoric that was subjective in tone, and with familiar materials one that sought emotional intensity to achieve concurrence from an audience. Williams and Wheelwright failed to conform in social and religious thought and in the patterns of rhetorical discourse.

Since H. L. Mencken used the *persona* of American Puritanism as a target for attacking much that was wrong in our society, Americans have often had difficulty recognizing much good from the Massachusetts Bay Colony. But in truth, like most people, the early Bay colonists possessed their share of both admirable qualities and damaging faults. As participants in the Protestant Reformation, they were committed to exercising a prophetic religion that highly elevated public discourse among their values. They also assumed a plain, expository style that repressed the quality of their rhetoric, and most important to this study, they assumed a social principle of conformity, albeit perhaps for a noble cause, that repressed diversity in their public discussions and removed a vital tension much needed in their society. Although they failed to give us a model for preserving the right of free speech in a pluralistic society, they nonetheless merit consideration because they inform us about the reasons for their failure. The covenant that bound them together for a common good and the offense they sensed at diversity in their conventional modes of expression were inadequate reasons for suppressing free discourse. While Anne Hutchinson, John Wheelwright, and their friends departed the Bay Colony and afterward became fatalities in misfortune among the Indians, a tragedy Bostonians believed to be divine judgment, Roger Williams moved on to Rhode Island to provide that another model for society could lead not to anarchy but to social order with freedom of thought and speech.

Notes

[1] John Lee Jellicorse, "Some Historical Essentials of Teaching Freedom of Speech," *Free Speech Yearbook: 1972*, ed. Thomas L. Tedford (New York: Commission on Freedom of Speech of the Speech Communication Association, 1973), pp. 76-84.

[2] For a description of the Hampton Court Conference and conditions in England during early years of James' reign, see G. M. Trevelyan, *England under the Stuarts* (Barnes and Noble, 1965), pp. 73-76.

[3] Marshall Smelser, *American Colonial and Revolutionary History* (New York: Barnes and Noble, 1963), p. 23.

[4] See Trevelyan, pp. 141-166, for a description of conditions the Puritans faced after 1625 with Charles I and Archbishop William Laud.

[5] John Cotton, "God's Promise to His Plantation," in Old South Leaflets (Boston: Directors of the Old South Work, n.d.), III, 1-16.

[6] John Winthrop, "A Model of Christian Charity," in The American Puritans: Their Prose and Poetry, ed. Perry Miller (Garden City, New York: Anchor Books, Doubleday and Company, Inc., 1956), pp. 80-83.

[7] Francis J. Bremer, The Puritan Experiment: New England Society from Bradford to Edwards (New York: St. Martin's Press, 1976), p. 60; Winthrop S. Hudson, "Theological Convictions and Democratic Government," in Puritanism and the American Experience, ed. Michael McGiffert (Reading, Massachusetts: Addison-Wesley Publishing Co., 1969), pp. 226-235.

[8] Bremer, p. 71.

[9] For biographies on Roger Williams, see Perry Miller, Roger Williams: His Contribution to the American Tradition (Indianapolis: Bobbs-Merrill Company, Inc., 1953); and Ola Elizabeth Winslow, Master Roger Williams: A Biography (New York: Octagon Books, 1957). Other biographies include John Garrett, Roger Williams: Witness Beyond Christendom, 1603-1683 (New York: Macmillan, 1970); Emily Easton, Roger Williams: Prophet and Pioneer (1930; New York: AMS Press, 1969); Cyclone Covey, The Gentle Radical: A Biography of Roger Williams (New York: Macmillan, 1969). Roger Williams' works are reprinted in The Complete Works of Roger Williams, ed. Rueben Aldridge Guild and others (New York: Russell and Russell, 1963).

[10] For a discussion of his developing thought, see James E. Ernst, The Political Thought of Roger Williams (1929; rpt. Port Washington, New York: Kennikat Press, Inc., 1966), pp. 19-22 and 174-205. Also see Edmund Sears Morgan, Roger Williams: The Church and the State (New York: Harcourt, Brace and World, 1967).

[11] See, for example, Winthrop's Journal: History of New England, 1630-1649, ed. James Kendall Hosmer (New York: Charles Scribners' Sons, 1908), I, 57. Williams was one of the few people whose arrival Winthrop mentioned in his diary. I have noted all dates between January 1 and March 25 with the year for both the Old Style or Julian calendar and the New Style or Gregorian calendar--thus February 5, 1630/31. Although the Julian calendar recognized New Year on January 1, British subjects continued the religious custom of recognizing New Year on March 25, and although some European Catholic countries accepted the new Gregorian calendar in 1582, British subjects did not accept it until 1752.

[12] Ernst, p. 7.

[13] For a more detailed account of the conflict see Ernst, pp. 13-19; Irwin H. Polishook, Roger Williams, John Cotton and Religious Freedom: A Controversy in New and Old England (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1967), pp. 1-35. Of special significance are Leon Ray Camp, "Man and His Government: Roger Williams vs. the Massachusetts Oligarchy," in Preaching in American History: Selected Issues in the American Pulpit, 1630-1967, ed. DeWitte Holland (Nashville, Tennessee: Abingdon Press, 1969), pp. 74-97; and Roger William Reed, "The

Rhetoric of a Colonial Controversy: Roger Williams Versus the Massachusetts Bay Colony," unpubl. diss. (Ohio State University, 1966).

[14] *Winthrop's Journal*, I, 162-163.

[15] His experiment at Providence only met with partial success, and in his later years few contemporaries recognized the significance of his contribution to the evolution of political and religious thought. For a record of his continuing dispute with Boston, see "A Letter of Mr. John Cottons, Teacher of the Church in Boston, in New England, to Mr. Williams," and "Mr. Cottons Letter Lately Printed, Examined and Answered by Roger Williams of Providence," in *The Complete Writings of Roger Williams*, I, n.p.

[16] *The Complete Writings of Roger Williams*, ed. Reuben Aldridge Guild (New York: Russell & Russell, 1963), I, 56; also see 42-43 for his argument against the use of civil authority to enforce conformity by an established church.

[17] Roger Williams, "A Passionate Testimony," in *Roger Williams, John Cotton, and Religious Freedom*, p. 118.

[18] For this account of the Antinomian controversy I am indebted to *The Antinomian Controversy, 1636-1638: A Documentary History*, ed., with intro. and notes, David D. Hall (Middletown, Connecticut: Wesleyan University Press, 1968); Charles Francis Adams, *The Antinomian Controversy*, ed., with intro., Emery Battis (New York: De Capo Press, 1976); and Emery Battis, *Saints and Sectaries: Anne Hutchinson and the Antinomian Controversy in the Massachusetts Bay Colony* (Chapel Hill, North Carolina: Institute of Early American History and Culture at Williamsburg, Virginia, by the University of North Carolina Press, 1962).

[19] Quoted by David D. Hall in *The Antinomian Controversy*, p. 7.

[20] "John Wheelwright, A Fast-Day Sermon," in *The Antinomian Controversy*, pp. 161-163.

[21] Quoted by David D. Hall in *The Antinomian Controversy*, pp. 7-8.

[22] *Winthrop's Journal*, I, 163.

[23] *Winthrop's Journal*, I, 239

[24] The covenant is explained in Perry Miller, *The Seventeenth Century*, Vol. I of *The New England Mind* (Boston: Beacon Press, 1965), pp. 398-431.

[25] John Winthrop, "A Model of Christian Charity," in *The American Puritans*, p. 83.

[26] The value that Bay colonists attributed to sermons is illustrated in an anecdote related in the diary of Samuel Sewell. On occasions, the widowed Mrs. Winthrop entertained Judge Sewell with wine and marmalade; the widower returned affections by placing in her hands a copy of sermons by some notable preacher. See Samuel Sewell, "Diary," in *The Puritans*, rev. ed., ed. Perry Miller and Thomas H. Johnson (New York: Harper and Row, Publishers, 1965), II 518-527, *passim*.

[27] This description of expository and imprecatory discourse was originally developed by the author in "Rhetorical Genres in Early American Public Address, 1625-1700," unpubl. diss. (University of Oklahoma, Norman, 1971), pp. 75-123. The study notes that rhetorical genres (1) must be developed out of the context of actual rhetorical practice, (2) must emerge from an inductive process of inquiry and reflective thought, (3) must be descriptive in definition, (4) must not only classify but also uncover relationships, and (5) must point to the intents and means of discourse (pp. 72-73 and 128-129). Also see Edwin Black's discussion of rhetorical genres in *Rhetorical Criticism: A Study in Method* (New York: Macmillan, 1965), pp. 132-137; and the discussion by Karlyn Kohrs Campbell and Kathleen Hall Jamieson in "Form and Genre in Rhetorical Criticism: An Introduction," in *Form and Genre: Shaping Rhetorical Action*, ed. K. K. Campbell and K. H. Jamieson (Falls Church Virginia: Speech Communication Association, n.d.) pp. 9-32. Campbell and Jamieson say a genre "is composed of a constellation of recognizable forms bound together by an internal dynamic" of tension among elements (p. 12).

[28] For a discussion of the jeremiad see Perry Miller, "Declension in a Bible Commonwealth," in *Nature's Nation* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1967), pp. 23-24; and Sacvan Bercovitch, *The American Jeremiad* (Madison, Wisconsin: University of Wisconsin Press, 1978).

[29] One of several occasions when Cotton succeeded with an expository rhetoric that met listeners' expectations is reported in *Winthrop's Journal*, I, 230.

THE REGULATION OF PORNOGRAPHY IN THE NEWS MEDIA

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In an article which appeared in the *National Law Journal* late in 1982, attorney Kathleen Lane *chronicled the development* of the First Amendment. She wrote:

> For the first 100 years following the passage of the First Amendment, the courts had a fairly easy time applying the law to the facts. The only medium was print and few arguments could be made against its full protection under the law. However, the second 100 years have not been so simple; the advent of radio and television, and, more recently, the explosion of new media in the last 10 years have raised more questions than the courts have been able to answer.[1]

An example of this explosion can be seen in the regulation of indecency and/or obscenity in the new media, which include videocassettes, videodiscs, cable, and direct broadcast satellites. As the *Washington Post* has observed:

> It poses, in a relatively new setting, a relatively ancient conflict: between the widely accepted notion that what people do of their own volition behind closed doors is by and large their own business, on the one hand, and the moral judgments of certain segments of the community, on the other. At the risk of over- simplification, it is a conflict between freedom and censorship.[2]

With the advent of new media forms, the old debate over sexually explicit material has taken on a new form. The courts, legislatures, local governments, citizens groups, and even listeners have been confronted with difficult choices about how to regulate such expression.

It is the intent of this paper to address this debate. Toward that end, this paper begins by exploring the extent of pornographic material in the new media. It then proceeds briefly to review the existing forms of regulation on indecent and/or obscene material. The final section of this paper argues that sexual material on the nw media should be treated in the same ways as the printed media.

Pornography and the New Media

In 1981, the *New York Times* reported that 80 million homes had television, 21 *million homes* were wired for cable, and 3 million homes had videocassette recorders.[3] It was projected that the number of cable subscribers will "nearly triple before 1990, while the number of video-cassette recorders will increase fivefold in the next four years."[4] Direct Broadcast Satellites (DBS) will soon begin competing for a share of these users.[5]

Along with this rise in the new media there has been a simultaneous increase in pornographic material. Beginning with the videocassette recorder, pornographic expression has begun to creep into the new media. As soon as videocassette recorders went on the market, enterprising entrepreneurs began to secure rights to pornographic expression. At the present time, the market for X-rated cassettes and discs is well established. In fact, between 25 and 50 percent of all cassettes sold are X-rated.[6]

A similar phenomenon can be seen in cable television. As of October 1981, over two million homes had access to services offering sexually explicit programming.[7] No less than six different services now offer such programming to subscribers.[8] These services include Playboy,[9] Penthouse,[10] Eros,[11] Private Screenings,[12] and Adults Only.[13] Most analysts predict that the number of such stations will increase in the future.[14] While some cable operators have been reluctant to provide such services,[15] and while some analysts question whether or not these services will catch on,[16] it seems likely that such resistance will be overcome. In the words of *TV Guide*, "[I]f subscribers want it badly enough, chances are that cable operators will back down and give it to them. We are, after all, talking about the marketplace."[17] In the future, when cable and direct broadcast satellites (DBS) will provide most television service it seems inevitable that these media will carry pornographic expression.[18]

Given this significant increase in sexually oriented programming, it is not surprising that local, state, and federal legislators have all proposed legislative remedies. At the local level, cities have attempted to solve the problems by enacting ordinances prohibiting "indecent" cable programming and by enforcing existing obscenity laws. Milwaukee, for example, has drafted an ordinance banning indecency and obscenity on cable television.[19] Miami has enacted a "clean TV" ordinance.[20] Several other towns have adopted similar ordinances.[21] Rather than adopting a new law, Cincinnati has attempted to control sexual expression on cable through obscenity prosecutions.[22] Other cities have prosecuted the distribution of obscene videocassettes.[23]

Similar legislation has been introduced in more than a dozen states.[24] Earlier this year *Broadcasting* reported that:

> Morality in Media, based in New York, has developed a model law it has offered to groups, cities, and legislatures in a number of states--Tennessee, Missouri, Arizona, California, North Dakota, New York, Louisiana, and Massachusetts, among them--whose representatives have expressed interest in barring from cable television material they consider indecent, what is coming to be called "cable porno."[25]

Perhaps most significant of all, legislation has been introduced into the United States Congress to control such expression. Early in 1982 *Broadcasting* reported that:

> The (DeCorcini) bill (s. 2136) would amend the Communications Act to allow fines of up to $10,000 and/or two years imprisonment for any person who "knowingly utters any obscene language or distributes any obscene material, by means of TV or cable TV." Indecent or profane language on TV would bring a find of up to $5,000 and/or one year's imprisonment.[27]

That version of the bill died in Committee, and no decision has been made on whether or not the bill will be resubmitted.[28]

Given the significant increase in sexual material on the new media, and the attempts for control which that increase has caused, it seems appropriate to consider exactly how far the government may go in regulating such expression. In order to determine the acceptable level of regulation, it seems necessary to consider the existing restrictions on other forms of expression.

Regulation of Indecent and/or Obscene Expression

While obscenity has been regulated through the history of the United States, only the twentieth century cases are relevant to this analysis.[29] In the 1942 decision of *Chaplinsky v. New Hampshire*, the Supreme Court held that obscenity was not protected by the First Amendment. The Court noted that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. They include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived is clearly outweighed by, the social interest in order and morality.[30]

The Supreme Court next addressed the issue of obscenity in *Roth v. United States* and *Alberts v. California*. In these cases, the court upheld two obscenity convictions.[31] In arriving at this result, the Court observed:

> All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of the guarantees, unless excludable because they encrough upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. We hold

> that obscenity is not within the area of constitutionally protected speech or press.[32]

Thus, the Court held that obscenity could constitutionally be prohibited since it was not deserving of the protections on expression contained within the First Amendment.

During the fifteen years after Roth, the Court occupied itself with the vexing task of defining obscenity. After a series of ambiguous decisions in which the definition of obscenity frequently changed,[33] the Court finally came to a consensus in Miller v. California. In that case the Court ruled that:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[34]

And it is this test which remains in effect at the present time.

Two other cases seem relevant for the purpose at hand. The first of these cases, Stanley v. Georgia, overturned the conviction of a defendant charged with the possession of obscene material. The material had been seized during a search of Stanley's home. In overturning the conviction, the Court held that the individual's right to privacy in his/her own home outweighed any state interest in the control of obscenity. The Court reasoned that "(I)f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[35] Thus, the Court seemed to hold that any individual had a right to read obscene material in his/her own home.

From this it might be argued that if an individual has a right to read obscene material within his/her own home that an individual must also have the right to purchase that material. Without a right to distribute such material the right to read such material within one's home would be meaningless. Relying on precisely this argument, one District Court claimed that Stanley overturned Roth. But in United States v. Reidel the Supreme Court summarily dismissed this argument. The Court argued that:

> To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion abjured.[36]

Thus, the Court concluded that while the individual was entitled to read obscene material in his or her own home that right did not extend to the purchase of such material.

Consequently, the prohibition of obscene material is absolute. The Court has consistently held that it is not protected by the First Amendment. Furthermore, in Miller the Court arrived at what a majority considered to be a workable definition of obscenity. Even though an individual is free to read obscenity in his/her own home, that right does not extend to include a right to produce or purchase obscene material.

The laws against obscenity apply to all media, although the broadcast media have been subject to even more restrictive regulations. In Federal Communications Commission v. Pacifica Foundation, the Supreme Court upheld the FCC's prohibition of radio broadcasts that were indecent but not obscene.[37] Consequently the Court upheld penalties which the FCC had imposed on the Pacifica Foundation for broadcasting a George Carlin monologue that included "words you couldn't say on the public airwaves."[38] In arriving at this conclusion the Court noted:

> In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.[39]

Thus, the Court held that such expression could be regulated within certain contexts. So long as there are legitimate state interests supporting regulation, the Court reasoned that such questionable material could be constitutionally suppressed.

In this case the Court found two state interests sufficiently compelling to justify the regulation. First, the Court held that the broadcast media are a pervasive influence which invade the privacy of the home. Because of that the Court reasoned that such material might intrude on an individual's privacy or that an individual scanning the spectrum might inadvertently become a captive audience. Given all this the Court concluded:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.[40]

The right of the people not to tune into such material inadvertently, according to the Court, outweighed any First Amendment right of the broadcaster to produce such material. Thus, the FCC action could be supported since it functioned to protect individual privacy while simultaneously minimizing the potential for captive audiences.

Second, the Court found that the state interest in protecting children justified the regulations. Unlike bookstores or motion picture houses, which can prohibit or limit exposure to minors, broadcasting is accessible to all people. Thus, the Court concluded that:

> We held in Ginsberg v. New York, that the government's interest in the "well-being of its youth" and in supporting "parents claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to

> broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.[41]

Because of the potential that children might be exposed to such material, the Court held that the state had a legitimate interest in suppressing such material. Accordingly the Court ruled that the FCC action could be upheld since it furthered a legitimate state interest in protecting minors.

In upholding the FCC action, the Court defined indecent as "nonconformance with accepted standards of 'morality.'"[42] By defining the word in this manner the Court differentiated "indecent" from "obscene." In the process, the Court held that not only "obscene" broadcasting, but also "indecent" broadcasting, was unprotected by the First Amendment. More importantly, the Court made no reference to the "redeeming social value" standard established in Roth and continued in Miller. Consequently, the Pacifica decision affords "indecent" broadcasting less protection than it affords to "obscene" material. While "redeeming social value" can save sexually explicit material, there appears to be nothing that can save "indecent" broadcasting.[43]

Given all this it can be concluded that the Court has afforded different levels of First Amendment protection to the various communication media. With respect to the print media the Court has held that the government cannot regulate content,[44] that the government can criminalize obscenity,[45] and that the government cannot punish indecency.[46] In sharp contrast, with respect to the broadcast media, the Court has held that the government can regulate some content,[47] that the government can criminalize obscenity,[48] and that the government can punish indecency.[49] Thus the critical question for the purpose of this analysis becomes how one views the new media. If one categorizes the new media with the print media then one set of restrictions is applicable, and if one categorizes the new media with the broadcast media then another set of restrictions is applicable. Reduced to the simplest terms, obscenity is never protected whereas indecent expression is protected if printed and unprotected if broadcast. Consequently, the next section of this paper concerns itself with determining the appropriate limits of government regulation of pornographic material in the new media.

Appropriate Regulation of the New Media

Since the Court has created different protections for different media it is impossible to treat the new media as a single entity. Rather, each medium must be considered individually so that the appropriate regulations can be ascertained. As the preceding section demonstrates, the same expression may be subjected to differing amounts of protection depending on which medium it is presented through.

Videocassette and videodisc. These new technologies are probably most akin to the print media.[50] In many ways, they are really no different than newpapers or books. The user of the videocassette or videodisc purchases a prerecorded program which s/he is able to play on a home unit. The user purchases exactly which program s/he wants and views that program at his/her discretion within the privacy of his/her own home. As a result, the technology seems essentially the same as the traditional printed media. The only tangible diffeence is that the message is received through watching and listening and not through reading.

Furthermore, the articulated interests used by the Court in the *Pacifica* decision are not relevant in this case. The first interest, intrusion into the privacy of the home, is clearly not relevant. Since the user would make a conscious choice to purchase the cassette or disc, and since the user could avoid exposure to objectionable tapes by simply not purchasing them, there is no state interest in preventing intrusion. Any exposure to offensive material would necessarily be the conscious choice of the viewer. By the same analysis, the second interest in protecting children, can be summarily dismissed. Since parents concerned about their children could either not buy cassettes or discs, or could control any cassettes or discs they might own, it would be possible to prevent any unwanted exposure. Unlike broadcast which is available to all, videocassettes and videodiscs are easily controlled by parents. The risk presented by the possession of a cassette or disc is no greater than the risk involved with sexual magazines or books.

Finally, contemporary practice with respect to videocassettes and videodiscs suggests that they are being controlled like printed material. There have been local, state, and federal obscenity prosecutions against producers and suppliers of cassettes and discs.[51] In these instances suppliers have been prosecuted through the same laws used to control obscene printed material. If nothing else, these prosecutions prove that videocassettes and discs have been operationally defined as printed material.

Cable. Whether one views cable as more akin to the print media or to broadcasting has a profound impact on what is permissible cable programming. Attorney Floyd Abrams has argued that "(T)he resolution of whether cable is to be more like broadcasting or more like newspapers, will determine a good deal of the future of what our country is likely to be watching in years to come."[52] By that Abrams means to suggest that if cable is considered to be broadcasting then it would be subject to the indecency limitations upheld in *Pacifica*, whereas if cable is considered to be more like a newspaper only the obscenity limitations would be applicable. Consequently, the regulatory model which one presupposes will greatly influence the resulting programming.

At the present time this issue is far from settled. The Supreme Court has never directly addressed the issue.[53] The proponents of indecency limitations on cable have forcefully argued that cable should be treated just like the other broadcast media. Paul G. McGready, general counsel of Morality in Media, has claimed that "(Y)ou can't logically make a distinction just because it comes in on a wire as opposed to over the air."[54] This sentiment notwithstanding, the preponderance of the evidence and analysis suggests that cable should be regulated like the traditional print media.

There are several different reasons for treating cable like the print media. The first of these reasons might be labeled the "functional characteristic" argument. According to this position, the characteristics of cable and broadcast media are significantly different. Thus, cable should not be regulated through mechanisms designed to regulate the broadcast media.

Relying on the difference between cable and broadcasting, a Federal District Court in Utah struck down a Roy City, Utah, ordinance prohibiting the distribution of "pornographic or indecent" programming.[55] The Roy City ordinance had been defended as a legitimate extension of Pacifica. In arriving at this result, Judge Jenkins argued that cable was not the same as broadcasting. According to Jenkins, the following table of characteristics clearly differentiates and distinguishes cable from broadcast television:

CABLE	BROADCAST
1. User needs to subscribe	1. User need not subscribe
2. User holds power to cancel subscriptions	2. User holds no power to cancel. May complain to FCC, Station, network, or sponsor
3. Limited advertising	3. Extensive advertising
4. Transmitted through wires	4. Transmittal through public airwaves
5. User receives signal on cable	5. User appropriates signal from the public airwaves
6. User pays a fee	6. User does not pay a fee
7. User receives preview of coming attractions	7. User receives daily and weekly listing in public press or commercial guides
8. Distributor or distributee may add services and expanded spectrum of signals or channels and choices	8. Neither distributor nor distributee may add services or signals or choices
9. Wires are privately owned	9. Airwaves are not privately owned but are publicly controlled

Because of these distinctions, Jenkins concluded that the Pacifica precedent could not be applied. Consequently, the District Court concluded that the Miller standard defined the appropriate level of regulation. The Court asked:

> If the Pacifica standard is not applicable, then what is? Is cable free from any limitations at all? The Miller standard is applicable. It is a national standard with a core of uniformity which allows for a degree of flexibility at a community level. It may be uniformly applied to almost all forms of publicly available communication. Books, magazines, cassettes, periodicals, movies, and cable television are all treated essentially in the same fashion regardless of numbers.[56]

Because cable was better categorized with printed expression, the Court concluded that:

> In short, neither in the guise of licensing or franchising, nor in the guise of authorizing the use of public property by a private business distributing electronic signals, can a municipality control message content that is not pornographic.[57]

Consequently, the Court held that the ordinance was unconstitutional.[58]

The District Court's analysis on the nature of cable is consistent with other work on cable. In a 1981 Report to Senator Packwood, the National Cable Television Association noted:

> [C]able television may at one time have fit relatively well into the broadcast category for First Amendment purposes, since cable operators did little more than retransmit broadcast signals. Today, with local origination of cable programs and the availability of cable networks, and with cable operators beginning to function much like newspaper editors, the newspaper analogy seems more appropriate, and the courts have begun to move in this direction.[59]

An even more detailed analysis contained in the New York University Law Review concluded that:

> A newspaper's content is limited only by what its publisher decides to print. Physically, the paper can be as large or as small as whim dictates, since there are no absolute limitations governing its size. Similarly, a cable system is limited in channel capacity only by the investment made by the system's owner and by the sophistication of the technology employed in its development. Even an initially small cable system may later grow through the addition of new cable or technology. A cable system, like a newspaper, can be set up by anyone on any scale--so long as financial backing is found and the public is interested enough to subscribe. Access to a flourishing newspaper is obtained through the purchase of advertising space, which provides the newspaper with substantial revenues beyond the income from subscriptions and news stand sales. Similarly, the public will obtain access to a functioning cable system probably by leasing channel space on which to disseminate independent programs--a development that provides a source of revenues in addition to subscriptions. Cable television is, in effect, an electronic newspaper.[60]

Both in structure, and in function, cable seems more like the newspaper than broadcasting.

A second analysis of why cable television should or should not be treated like the print media might be called the "interest test" argument. According to this position, the interests which justified the Pacifica decision are not applicable to cable television. Those interests, it will be recalled, were the protection of the privacy of the home, the potential for a captive audience, and the risk of exposure to children. But given the nature of cable television, it is arguable whether or not those interests are relevant.

Cable television is not imposed on anyone. The individual listener decides whether or not s/he wishes to purchase cable service. It is listener choice to initiate the service, and it is listener choice to continue the services. More importantly, most objectionable material is available only if the viewer pays an additional charge. Not only must the individual undertake to obtain cable service but s/he must also take the additional step of subscribing to the special adult service. Given all this, any intrusion into the home or captive audience is entirely a self imposed harm. The state has no legitimate interest in preventing this harm.

Furthermore, the same features of cable make it unlikely that any children will be unnecessarily exposed to such programming. If the parent is truly concerned about the risk of exposure that parent can discontinue either the special service or the cable services. The availability of lockout devices, which enable the parent to shield the child from certain channels, further minimizes the possibility of exposure.[61] Finally, if the parent were truly concerned s/he could monitor the actual programming the child was watching.

In his pioneering work on the regulation of obscenity on cable Robert Powe noted that:

> No theory or regulation, from the fear of media power to special concern for children to the solicitude for a quasi-captive audience, that treats cable differently from the non-broadcast media can withstand scrutiny.[62]

After reviewing the Court's decision in *Pacifica*, the *George Washington Law Review* reached precisely the same conclusion when it argued:

> The justifications for governmental regulation of indecent broadcast programming do not support similar regulation of cable television programming. Indecency on cable television does not invade the privacy of the home, and viewers do not constitute a captive audience. Furthermore, any state interest in protecting children served by indecent programming regulations can be pursued through less restrictive measures that respect parents' prerogatives in childbearing. Some persons may find indecent programming to be distasteful or offensive. Yet, their ability to protect themselves and their children from exposure to it precludes governmental restriction of this form of expression.[63]

The state interests used to justify the FCC regulations in *Pacifica* are simply not present with cable.

A third analysis of why cable television should not be treated like the print media might be called the "judicial intent" argument. According to this position, the *Pacifica* decision was never intended to apply to cable television. This intent is particularly evident in the dicta at the end of the *Pacifica* decision. In these closing paragraphs of the case the Court stresses the "narrowness" of the holding.[64]

Furthermore, were the *Pacifica* decision read to include cable, it would have the effect of radically restricting a new media form. In their argument that the Court did not intend to include cable in *Pacifica*, Thomas Krattenmaker and Marjorie Esterow observe that:

> The danger of extending *Pacifica* to cable is self-evident. Such an extension would not only open the door to limit what is increasingly becoming an important additional means of disseminating diverse ideas and information, but also would threaten to destroy the first amendment rights of individuals to say, see, and hear what they choose. As the Court has aptly stated elsewhere, "[w]hatever the power of the state to control public dissemination of ideas inimical to public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[65]

Given the negative consequences of reading *Pacifica* as applying to cable, Krattenmaker and Esterow conclude that the Court must never have intended such an application. It is their contention that the Court, as evidenced by the dicta, never intended for *Pacifica* to apply beyond the immediate situation. Consequently, they believe that any attempt to apply the *Pacifica* precedent to cable is illegitimate.

Thus, it might be concluded that three different arguments have been advance to support the claim that *Pacifica* should not be applied to cable. The first of these arguments, the "functional characteristics" position, holds that *Pacifica* does not apply to cable because cable is not broadcasting. The second of these arguments, the "interest test" position, holds that *Pacifica* does not apply to cable because the state interests used to justify *Pacifica* are not present with cable. The third of these arguments, the "judicial intent" position, holds that the Court never intended for *Pacifica* to apply to cable. Given all this, it seems that there is a strong case that *Pacifica* does not and should not apply to cable.

Direct broadcast satellites. Although DBS technology differs substantially from cable technology most of the arguments which claim that *Pacifica* should not apply to cable are also relevant to DBS. This is because the economics of DBS are very similar to the economics of cable. While it is true that DBS is technologically distinct from cable, it is unlikely that a different economic structure will result. Charles Ferris has observed that:

> Because DBS reception requires relatively expensive receiving antenna and other equipment in addition to the conventional television set, audiences would probably not be willing to invest in the equipment unless DBS offered superior programming to that available from the other video delivery systems. Expensive to produce, such programming would likely be offered on a subscription basis.[66]

Thus, if sexual material is offered through DBS it will probably be on a subscription basis.

Given that the material will be available on a subscription basis, all of the arguments against applying *Pacifica* to cable would also be relevant to DBS. The functional characteristics of DBS are more akin to cable than to broadcasting. As a result, a "functional characteristics" argument could be made against applying *Pacifica* to DBS. While it is true that DBS is transmitted through the public airwaves instead of coaxial cable, the other differences between cable and broadcasting still apply. The user must subscribe, the user can cancel the subscription, advertising is limited, the user pays a fee, and the user receives previews of coming attractions. Thus, even if DBS does use the public airwaves it can still be distinguished from broadcast media such as radio.

Furthermore, by either the "interest test" or by the "judicial intent" arguments it can be claimed that *Pacifica* does not apply to DBS. Exactly the same set of claims can be advanced for both cable and DBS. None of the interests protected in *Pacifica* are present with either cable or DBS. The same can be said of the "judicial intent" argument. For the same reasons that many doubt *Pacifica* was intended to apply to cable it can be argued that *Pacifica* does not apply to DBS.

So by way of summary, it can be argued that none of the new media identified in this paper are subject to the "indecency" requirements set out in *Pacifica*. Since the new media are more akin to the print media than to cable, it can be argued persuasively that they should only be subject to those restrictions relevant to the print media. As was pointed out earlier, the only restrictions on pornographic material in the print media are laws against obscenity. Thus, it can be concluded that the new media should be subject only to the relevant obscenity laws.

Conclusion

As was noted in the opening section of this paper, the new media have presented a vexing series of regulatory questions for policymakers and the courts. Foremost among these questions is the control of sexual material. Such material is currently widespread, and if predictions hold true, such material will increase significantly in the future. There can be little doubt but that significant quantities of pornographic expression will permeate the new media. Given this increase in pornographic expression, a new wave of local, state, and perhaps even federal laws against "indecency" on the new media seems likely. But, as this paper has pointed out, such laws are unlikely to withstand constitutional challenge. Since the new media fall within the same category as the traditional print media, laws attempting to regulate "indecent" or "pornographic" expression are destined to fail. The new media can only be regulated through the obscenity laws set out in *Chaplinsky*, *Roth*, *Albert*, and *Miller*. The new media cannot be regulated through laws against "indecent" broadcasting such as those in *Pacifica*.

Endnotes

[1] Kathleen Lane, New Technology v. 1st Amendment, *National Law Journal*, 1 November 1982, p. 11.

[2] "Cable's Soft-Porn Furor," *Washington Post*, 6 September 1982, p. D1.

[3] "The TV Pornography Boom," *New York Times Magazine*, 13 September 1981, p. 44

[4] "The TV Pornography Boom," p. 44

[5] "FCC Opens the Skies to DBS," *Broadcasting*, 28 June 1982, p. 27.

[6] "The TV Pornography Boom," p. 44.

[7] "Battle Intensifying Over Explicit Sex on Cable TV," *New York Times*, 3 October 1981, p. 16.

[8] "Cable's Blues in the Night," *Newsweek*, 24 August 1981, p. 48.

[9] "Playboy bets on Cable to Replace Gambling," *Business Week*, 16 November 1981, p. 49. "Playboy TV Show Debuts on Cable Venture Tonight," *Wall Street Journal*, 22 January 1982, p. 8. "Left and Right of Centerfold," *Cable Vision*, 1 February 1982, p. 13. "Bunnies on the Home Tube," *Time*, 15 February 1982, p. 61. "Earth doesn't move after Playboy advent as cable channel," *Broadcasting*, 22 February 1982, p. 56. "Playboy's latest new media venture," *Broadcasting*, 17 May 1982, p. 40. "Playboy Video," *Playboy*, December 1982, p. 236. "Playboy's Hopes in Cable TV," *New York Times*, 15 March 1983, p. D1. "Now the Playmates move--but will America pay to watch? *TV Guide*, 25 June 1983, p. 48.

[10] "Penthouse's Cable Gamble," *Rolling Stone*, 15 October 1981, p. 69.

[11] "Playboy's Hopes in Cable TV," p. D1. "Concern Grows that 'Adult' Programming May be Reaching More American Homes and Children," *Christian Science Monitor*, 21 January 1982, p. 12.

[12] "Playboy's Hopes in Cable TV," p. D1. "Concern Grows," p. 12.

[13] "Concern Grows," p. 12.

[14] "Playboy's Latest Media Venture," p. 8. "Concern Grows," p. 12. "Left and Right of Centerfold," p. 13.

[15] "Growing Concerns," p. 12.

[16] "Pay Cable TV Is Losing Some of Its Sizzle As Viewer Resistance, Disconnects Rise," *Wall Street Journal*, 19 November 1982, p. 1; and "Pay-TV Industry Facing Problems After Misjudging Market Demand," *Wall Street Journal*, 29 June 1983, p. 37.

[17] "Now the Playmates move--But Will America Pay to Watch?" p. 48.

[18] At the present time there is no pornographic expression available on DBS. No doubt this is due to the fact that DBS is till in its infancy as a technology. As DBS grows into a viable medium it appears inevitable that it will carry such expression.

[19] "Making Federal Case out of 'cable porn,'" *Broadcasting*, 21 February 1983, p. 74.

[20] "Miami Moves to Stop the Blues," *Newsweek*, 14 February

1983, p. 81. The Miami ordinance has since been overturned as being overbroad. "In handing down his decision Tuesday, ending months of litigation, Judge Hoeveler said, 'The understandable anxieties of the city fathers cannot provide the basis for approving legislation which in its reach exceeds the dangers they contemplate.'" "Law on Cable-TV Smut Overturned," New York Times, 4 August 1983, p. C20.

[21] "Cable TV's Sex Problem," National Law Journal, 15 February 1982, pp. 23-24; and "Utah Passes Cable Porn Law: The Best in the Nation," National Decency Reporter, July-August 1983, p. 1.

[22] "Battle Intensifying Over Explicit Sex on Cable TV," p. 16; and "Warner Amex Cable Unit in Cincinnati Indicted for Obscenity," Wall Street Journal, 14 June 1983, p. 4.

[23] p"Hard Core Cassettes Being Prosecuted," Washington Post, 1 January 1983, in National Decency Reporter, March-April 1983, n.p.

[24] "Battle Intensifying Over Explicit Sex on Cable TV," p. 1 and p. 16; "Cable TV's Sex Problem," pp. 23-24; and "Cable's Blues in the Night," p. 48.

[25] "Making Federal Case out of 'cable porn,'" p. 73.

[26] The state of Utah is a good example. "Utahans Fight Over Decency on Cable TV," Wall Street Journal, 23 September 1982, p. 37.

[27] "Television porn bill introduced in Senate," Broadcasting, 8 March 1982, p. 142; and "Making Federal Case out of Cable Porn," p. 73.

[28] "Making Federal Case out of 'cable porn,'" p. 73.

[29] This account is based on: Gerald Gunther, Constitutional Law: Cases and Materials, 10th ed. (Mineola, N.Y.: Foundation, 1980), pp. 1344-1380; William B. Lockhart, Yale Kamisar, and Jesse H. Choper, The American Constitution: Cases and Materials (St. Paul: West, 1975), pp. 711-746; Harold W. Chase and Craig R. Ducat, Constitutional Interpretation: Cases--Essays--Materials (St. Paul: West, 1979), pp. 1325-1350; Franklyn S. Haiman, Freedom of Speech (Skokie, Ill.: National Textbook, 1981), pp. 111-150; Franklyn S. Haiman, Speech and Law in a Free Society (Chicago: University of Chicago, 1981), pp. 164-181.

[30] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1941).

[31] Roth was a New York publisher who had been convicted of violating a Federal law prohibiting the mailing of obscene materials. Alberts ran a mail order business and was convicted of violating a California law prohibiting publication or possession for sale of obscene materials. Roth v. United State, 354 U.S. 476, 480-481 (1957).

[32] Roth v. United States, 354 U.S. 476, 484-485 (1957).

[33] "Controversy and disagreement raged among the members of the Court, and at least thirty-one obscenity cases were decided in the period between 1957 and 1973. The Court found it

difficult to agree upon what speech did not deserve first amendment protection." "FCC Content Regulation of Cable-Pay Television: The Threat of *Pacifica*," *Cumberland Law Review* 9 (Winter 1979): 816.

[34] *Miller v. California*, 413 U.S. 15, 24 (1973).

[35] *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

[36] *United States V. Reidel*, 402 U.S. 351,355 (1971).

[37] "Advancing several reasons for treating broadcast speech differently from other forms of expression, the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. Section 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications," and 47 U.S.C. Section 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest." *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 731 (1978).

[38] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 751 (1978).

[39] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 747-748 (1978).

[40] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[41] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 749 (1978). Citations omitted.

[42] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 740 (1978). In the supporting footnote the Court noted: "Webster defines the term as 'a: altogether unbecoming; contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate; hardly suitable; UNSEEMLY... b: not conforming to generally accepted standards of morality:...' *Webster's Third New International Dictionary* (1966)."

[43] A variant of this argument is advanced in "Indecent Programming on Cable Television and the First Amendment," *George Washington Law Review* 51 (March 1983): 256-259; "FCC Content Regulation of Cable Pay-Television: The Threat of *Pacifica*," pp. 820-823; and Thomas G. Krattenmaker and Marjorie L. Esterow, "Censoring Indecent Cable Program: The New Morality Meets the New Media," *Fordham Law Review* 51 (March 1983): 617-622.

[44] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[45] *Roth v. United States* and *Alberts v. California*, 354 U.S. 476 (1957); *United States v. Reidel*, 402 U.S. 351 (1971); and *Miller v. California*, 413 U.S. 15 (1973).

[46] *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

[47] While the government may not regulate the actual content of any given program, the Court has upheld a broad variety of restrictions on political broadcasting, allowed the Fairness Doctrine and the Prime Time Access Rule, and permitted limitation

on specific types of advertising. Harvey L. Zuckman and Martin J. Gaynes, *Mass Communications Law* (St. Paul: West, 1977) pp. 352-386.

[48] *Illinois Citizens Committee for Broadcasting v. Federal Communications Commission*, 515 F.2d 397 (D.C. Cir), rehearing den. 515 F.2d 407 (D.C. Cir, 1975).

[49] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

[50] See for example, Warren K. Agee, Phillip H. Ault, and Edwin Emery, *Introduction to Mass Communication*, 6th ed. (New York: Harper and Row, 1979), pp. 282-283; and Samuel L. Becker, *Discovering Mass Communication* (Glenview, Ill.: Scott Foresman, 1983), pp. 439-447

[51] "The TV Pornograpny Boom," p. 120. "Hard Core Cassettes Being Prosecuted," and" Memorandum on Methods to Halt Distribution of Obscene Television Video Cassettes," *National Decency Reporter*, March-April 1983, n.p.

[52] Floyd Abrams, "Battle Intensifying Over Explicit Sex on Cable TV," p. 16.

[53] In the cases that have come before the Court it has avoided ruling on the constitutional limitations on government regulation of cable. *Community Communications Co. v. City of Boulder*, 455 U.S. 49 (1982); and *Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689. "Indecent Programming on Cable Television and the First Amendment," *George Washington Law Review* 51 (January 1983): 256. For a more detailed analysis see William J. Toman, "Local Regulation of Cable: The *Boulder* Cases," *Communications and the Law*, Spring 1983, pp. 41-50.

[54] Paul G. McGready, "Battle Intensifying Over Explicit Sex on Cable TV," p. 16.

[55] The ordinance stated that the cable franchise could be revoked or other sanctions imposed if the operator "(K)nowingly distributes any pornographic or indecent material as defined by law and in violation of the community standards of the community encompassed within the territorial area included within the Roy City boundaries." The ordinance went on to define "Indecent Material" as a "representation or verbal description of: (a) An erotic human sexual or excretory organ or function; or (b) Erotic nudity; or (c) Erotic ultimate sexual acts, normal or perverted, actual or simulated; or (d) Erotic masturbation; which under contemporary community standards is patently offensive." *Community Television of Utah, Inc., v. Roy City*, 555 F. Supp 1164, 1174, 1176 (1982).

[56] *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp 1164, 1169 (1982).

[57] *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1172 (1982).

[58] A similar result might be achieved through overbreadth analysis. See "Cable 'Porn,'" *New York Law Journal*, 11 March 1982, p. 2.

[59] "National Cable Television Association Position Paper," in *Cases and Materials on Communications Law*, vol. 2, ed. Nicholas Johnson (Iowa City, Iowa: University of Iowa College of Law, 1981), p. IX-9.

[60] "Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper," *New York University Law Review* 51 (April 1976): 146.

[61] "Battle Intensifying Over Explicit Sex on Cable TV," p. 16.

[62] L.A. Power, Jr., "Cable and Obscenity," *Catholic University Law Review* 24 (1975): 753.

[63] "Indecent Programming on Cable Television and the First Amendment," p. 268.

[64] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

[65] "Censoring Indecent Cable Programs: The New Morality Meets the New Media," pp. 635-636.

[66] Charles D. Ferris, "Direct Broadcast Satellites: A Piece of the Video Puzzle," *Federal Communications Law Journal* 33 (Spring 1981): 175.

"PERSPECTIVES ON PORNOGRAPHY AND FREE SPEECH'

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Even the most zealous advocates of free expression in America recognize that "certain kinds of competing interests can justify restrictions on communication."[1] Noted free speech scholar Franklyn Haiman writes, accordingly, that the true issue in First Amendment law is the determination of "the circumstances which justify restrictions on communication."[2]

Within the many subsets of First Amendment law there are varying levels of complexity and degrees of coherence. In each type of case, the Court and its public attempt to "draw the line" between free expression and its competing interests. Barron and Dienes write that of these many contexts, obscenity law is "one of the most restless and constantly changing sets of rules."[3] This paper will review the complex area of First Amendment law as it relates to the debate over the censorship of pornography. Following a brief introduction to obscenity law, the paper will advance arguments to support the following three related claims: 1) rapidly increasing levels of violence in obscenity create the need to re-examine the liberal versus conservative dichotomy which dominates current scholarship on the debate over censorship of obscenity; 2) the introduction of the issue of violence into discussions about obscenity leads to a useful distinction between two classes of obscene materials: erotica and pornography; and (3) social scientific applications of this distinction reveal the need to re-examine the standard arguments advanced for and against the censorship of pornography.

The overriding precedent in censorship law today is the 1973 case of Miller v. California.[4] This case "involved a state criminal prosecution for aggressive selling of sexually explicit materials to unwilling recipients who had in no way invited such solicitation."[5] The majority maintained the Court's position that obscene materials are less protected by the First Amendment than most other types of expression. Further, the Court provided a three-pronged test to redefine obscenity. In each instance, the determination depends upon:

> a) whether the 'average person, applying contemporary standards' would find that the work, taken as a whole, appeals to the prurient interest, b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law, and c) whether the work,

> taken as a whole, lacks serious literary, artistic, political, or scientific value.

The state interest in *Miller* was defined as "stemming the tide of commercialized obscenity" including "the interest in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety."

As Barron and Dienes observe, the *Miller* standard "speaks to the minimal protection a state must accord free expression values in the obscenity area."[6] Each community may decide within that minimal area of protection how it wishes to control the production and dissemination of sexually explicit materials.

The Liberal versus Conservative Dichotomy

The resulting division between those who favor placing restrictions on obscenity and those who do not is usually viewed in traditional conservative vs. liberal terms. Ruth McGaffey's case study of an anti-pornography campaign in LaCrosse, Wisconsin, effectively illustrates an instance in which this perception conforms with reality.[7] On the one side of the LaCrosse controversy were Citizens for Decency in LaCrosse. These advocates for restrictions on obscenity "marched for decency" to protect the "moral character of the community." The LaCrosse advocates are representative of the conservative element traditionally associated with pro-censorship forces. They seek to protect "public morality," to prevent "more permissive sexual mores," to avoid the "distasteful effects" they associate with obscenity, and to eliminate "offensive" forms of expression from their environments.[8]

In contrast, opponents of restrictions on obscenity in LaCrosse focussed primarily on the dangers of censorship. They expressed concern, for example, that "once you allow the government to regulate the kind of things people are reading, then the door is wide open for government abuse."[9]

In LaCrosse, as elsewhere, the lines were drawn between people characterized by their opponents as "pro-censorship" and those characterized as "pro-smut." In reality, these groups represent world views with opposing value heirarchies: the overriding need to protect social mores versus the ultimate interest in protecting the rights of privacy and free expression.

Another group sometimes associated with the move toward censorship of obscenity falls outside the scope of the traditional conservative vs. liberal division. As Haiman notes, this group borrows Alexander Meiklejohn's premise that "*The* freedom of speech which is protected from abridgment by the First Amendment is only that communication which has to do with decision-making about politics and public affairs."[10] In addition, these advocates of censorship rely on "the old dualistic faculties psychology which assumed a sharp distinction between reason and emotion, thought and feeling, and which would have the First Amendment apply only to the so-called 'higher' of these faculties."[11]

Fortunately, the Court has chosen not to adopt this position, apparently recognizing that:

> to allow the state to decide whether any particular communication is aimed at our 'higher faculties' or

> at our 'senses' and to forbid the latter would be to open the way for actions which could strike anywhere.[12]

Further, since 1948 the Court has recognized that:

> The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.[13]

Perhaps because the Court has failed to accept the dualist perspective, most discussions of obscenity and censorship cast the debate in traditional conservative vs. liberal terms, such as those used in the LaCrosse controversy. Indeed, most free speech scholars join liberals and conservatives alike in adopting a traditional definition of 'obscenity." Haiman writes, for example, that obscenity is:

> communication labeled as obscene or pornographic--that is, sexually oriented material, in either words or pictures, which is said to arouse lust in a reader or viewer, presumably creating 'shameful' or 'morbid' sexual attitude.[14]

Acceptance of this view naturally leads free speech scholars to oppose any attempts to regulate obscenity.[15] Understandably, they believe that this category of expression warrants full First Amendment protection, regardless of the Court's official position to the contrary.

However, this perspective fails to consider adequately the role increased levels of violence may play in the debate over censorship of obscenity. Indeed, most traditional scholarship on the debate fails to include detailed discussion of the relationship between violence, pornography, and censorship. This omission may well relate to the fact that:

> in sharp contrast to our legal system's longstanding preoccupation over the dissemination of sexually related communication, there has been an almost completely laissez-faire attitude toward the portrayal of violence.[16]

Yet as early as 1974, researchers discovered marked increases in the amount of violence depicted in pornographic materials.[17] Furthermore, scholars recognize that the "detailed and vivid simulation of brutality made possible with film has indisputably posed new questions for consideration."[18] At minimum, resolution of the issue of whether access to obscenity should be regulated requires attention to the new questions increased levels of violence contribute to the debate. As with any other First Amendment issue, an analysis of the balance between the rights of free expression and other competing civil rights first requires accurate characterization of those competing interests.

The Differences Between Erotica and Pornography

Efforts to provide such characterizations have led some researchers to depart from the traditional view of obscenity. Unlike liberals and conservatives, these researchers separate obscene materials into two categories: erotica and pornography. Erotica on this view is said to depict mutually desired sexual activity. In contrast, pornography is said to include all verbal or pictorial material which represents or describes sexual behavior that is degrading or abusive to one or more of the participants in such a way as to endorse the degradation. On this view, pornography endorses humiliation and torture; pornography is inherently violent. Zillman and Bryant have suggested, however, that:

> there is considerable ambiguity in such definitional approaches. In the portrayal of sadomasochistic behaviors, for example, the parties involved may be said to be there by 'positive choice', or in depictions of bestiality the animals may do what they do for morsels of food rather than an avoidance of the whip.[19]

To address this important challenge, proponents of the distinction between erotica and pornography will need to clarify further the role which favorable displays of violence, degradation, and abuse play in pornography as opposed to erotica. They will need to note, for example, that the endorsement of the "violent, abusive, or humiliating sexual activity" characteristic of pornography separates this class of material from erotica much more distinctly than the simple notion of mutual desire. Further, depictions of affection, warmth, friendship, or love in erotica separate this class of material from pornography more than the mere declarations of consent characteristic of such activities as sadomasochism. In sum, unlike pornography, erotica in no way endorses violence, abuse, or degradation. Gloria Steinem's discussion of the origins of the words 'erotica' and 'pornography' may further help explain the distinction:

> 'erotica' is rooted in 'eros' or passionate love, and thus in the idea of positive choice, free will, the yearning for a particular person....'pornography' begins with a root 'porno,' meaning 'prostitution' or 'female captives,' thus letting us know that the subject is not mutual love, or love at all, but domination and violence against women....It ends with a root 'graphos,' meaning 'writing about' or 'description of,' which puts still more distance between subject and object, and replaces a spontaneous yearning for closeness with objectification and voyeurism.[20]

At the heart of this perspective is the belief that the violence characteristic of pornography sets this material apart from other sexually oriented material. Many feminists who have adopted both this view and a growing concern over pornography's harmful effects, have begun to call for governmental regulation of pornography. This historic shift of opinion warrants close attention.

The Feminist Perspective

Feminists have consistently been among the most zealous advocates of free expression, free press, and privacy. Most feminist-based philosophy objects to any censorship which is fostered by tenuously defined standards of taste. Furthermore, most feminists believe that the "inherent dangers of undertaking to regulate any form of expression"[21] must be very carefully justified. Finally, contemporary feminist scholars recognize that pro-censorship forces have long been "enemies" of the feminist movement. Diana E. H. Russell writes accordingly:

> We have observed that the anti-pornography forces have almost always been conservative, homophobic, antisex, and pro the traditional family. They have equated nudity and explicit sex with pornography. They are also against abortion, the Equal Rights Amendment, and the Women's Liberation Movement.[22]

Yet many feminists have found themselves joining conservative efforts to place restrictions on pornography. This apparent paradox is readily resolved in light of the feminist adoption of the distinction between erotica and pornography. This distinction--introduced as a result of increased attention to the role of violence in the controversy--provides the framework for vital differences between feminist justifications for censoring pornography and the arguments advanced by their conservative counterparts.

Implications of the Erotics/Pornography Distinction

The most obvious difference between the feminist and conservative perspectives is, of course, the definition each provides for the material in question. Feminists distinguish between material which depicts mutually desired sexual activity and material which endorses violent, abusive, and/or degrading sexual activity. In contrast conservatives (and, for that matter, liberals as well) lump all obscenity into that class of materials which explicitly represents sexual behavior or obscenely depicts sexual organs.

Importantly, feminists fail to share the concern over "taste," "social standards," or "sexual permissiveness" which has led conservatives to oppose strongly unfettered public access to erotica. Indeed most feminists oppose any restriction on public access to erotica. In sharp contrast with their conservative counterparts, feminist frame their campaigns for placing restrictions on the dissemination of pornography around the claim that cases involving pornography involve competing civil rights which justify governmental intervention.[23] Specifically, feminists believe that public displays of pornography have harmful emotional and physical effects on women and children because they are portrayed as the objects of violence, abuse and humiliation.

Social Scientific Applications of the Distinction Between Erotica and Pornography

Until recently, social scientific research had provided little support for these concerns. For example, the President's Commission on Pornography (1970) "concluded that exposure to pornography does not seriously promote antisocial behavior."[24] Since the publication of this report, however, social scientists have seriously questioned these and other related findings. It is widely known, for example, that the 1970 "report was based on data obtained before violent sexuality was widely portrayed."[25] Furthermore, the Pornography Commission "did not undertake a single controlled laboratory study involving children."[26] Nor did the Commission, "which carried out the most thorough examination of pornography to this date," either examine or commission "any research which systematically described or analyzed the actual content of sexually explicit materials."[27] Perhaps most importantly, the Commission failed to "distinguish between materials that merely depicted explicit sexual content and those involving violent portrayals of sexual relationships."[28]

Indeed, detailed literature reviews have led social scientists to criticize the bulk of previous experimental studies on the effects of pornography. Such reviews reveal, for example, that few previous studies have addressed the impact of pornography on women's lives. Furthermore, previous researchers have relied heavily on two models--the imitation and catharsis models--subject to considerable criticism."[29] Perhaps more significantly, "research on erotica effects has hitherto concentrated on pleasant fare and the effects of so-called rough stuff have been largely neglected."[30] Pauline B. Bart and Margaret Jozsa have concluded that this research has left many questions unanswered because:

> a) it uses the terms "erotica," "pornography," and "sexually explicit" interchangeably, with no distinction made regarding the amount of violence present in the researched materials; b) most such research was done before violence became a central aspect of pornography, thereby limiting our knowledge of the effects of increased amounts of violence in pornography; and c) most researchers and subjects studied were male, hence, limiting our knowledge of the effects of pornography on women.[31]

Researchers have recently attempted to fill these voids. Use of the distinction between erotica and pornography is leading a number of scholars to contend that the pervasiveness of violence in pornography is less than benign. For example, Diana E. H. Russell's survey of women in the San Francisco area disclosed ten percent who reported feeling upset by men who attempted to imitate behavior they had seen in pornography. Russell notes that it was possible that some of these women had been wrong in thinking that the men's ideas had been inspired by pornography. Russell adds, however, that these instances are likely offset by instances of upsetting sexual contact in which women are not aware that their partner's ideas have come from a pornographic book or film.[32]

Other research confirms Russell's belief that at least some harmful attitudes may be associated with exposure to pornography. For example,

> Malamuth and Donnerstein (1980) found that exposure to violent pornography increased the levels of electric shock male subjects chose to deliver to a female confederate of the experimenter. Similarly, Malamuth (1981) found that repeatedly exposing male

> subjects to violent pornography resulted in self-generated rape fantasies. Further, Malamuth and Check (1980) reported that male subjects who were first exposed to the type of rape portrayal typically found in pornography perceived less victim trauma upon hearing a more realistic rape depiction. Finally, correlational data indicate that sexual arousal to certain types of rape as contrasted with consenting portrayals is positively correlated for male college students with self-reported possibility of raping....[33]

Malamuth and Check found further that exposure to films "portraying violent sexuality increased male subjects' acceptance of interpersonal violence against women."[34]

Zillman, Bryant, and Carveth's findings on the effects of exposure to bestiality and sadomasochism on men's level of aggression led them to write:

> If exposure to such erotic fare as bestiality or sadomasochism proves disturbing (and it apparently has this effect on many young men), this exposure further aggravates the provoked individual and thus promotes motivated aggression.[35]

Seymour Feshbac has found further that:

> males exposed to sadomasochistic stories are more likely to be sexually aroused by rape stories, more likely to believe that victims enjoy rape, and more likely to say that they would behave like fictional rapists when assured of nonpunishment.[36]

Another study published in 1982 concludes that massive exposure to pornography leads to a loss of compassion toward women as rape victims, callousness toward women in general, and a disposition in favor of lighter jail sentences for convicted rapists.[37] In addition:

> a number of studies have shown that sexual arousal to sexually violent pictorials and stories (but not arousal to nonviolent sexuality) is correlated with callous attitudes towards rape and with a self-reported possibility of committing a rape.[38]

Interestingly, it has been found that "many rapists strongly believe that their victims derive pleasure from being assaulted."[39]

Not surprisingly:

> Marvin Wolfgang, a well-known sociologist and one of the authors of The Report of the Commission on Obscenity and Pornography, appears to have changed his assessment of pornography's effects. Wolfgang has recently said that 'the weight of the evidence (now) suggests that the portrayal of violence tends to encourage the use of physical aggression among people who are exposed to it.'[40]

Proposed Solutions

These and other related findings provide strong support for the claim that the increased levels of violence characteristic of today's obscene materials create dangers to valued human rights. Fruitful dialogue on the issue of whether to restrict public access to obscenity requires attention to these alleged dangers. That is, to address effectively the issue of censorship, the rights of pornographers to display their material publicly must be measured against the civil rights found to be endangered by exposure to pornography.

Importantly, "the production of pornography is a capricious and haphazard enterprise with infrequent attention to copyright laws and other established procedures."[41] Indeed, Smith has found that often "whole sections of books are plagiarized word for word from book to book, often with only a change in the name of the characters to fit the host book."[42] It could be argued, therefore, that much pornography is neither produced nor distributed for literary, scientific, artistic, philosophical, or political enlightenment. At the same time, we have seen that these materials appear seriously to inhibit people's capacity to develop fully. Further, the Zillmann-Bryant research suggests that exposure to public displays of pornography is likely to inhibit fruitful dialogues between men and women.[43]

Yet are the dangers to civil rights associated with pornography so serious as to justify infringing the First Amendment rights of pornographers and their audiences? This central question has led to a flury of debate among those who wish to protect society from the effects of pornography without jeopardizing cherished First Amendment freedoms. Andrea Dworkin has written the following on this issue:

> By definition the First Amendment protects only those who can exercise the rights it protects. Pornography by definition--"the graphic depiction of whores"--is trade in a class of persons who have been systematically denied the rights protected by the First Amendment and the rest of the Bill of Rights. The question...is not whether the First Amendment protects pornography or should, but whether pornography keeps women from exercising the rights protected by the First Amendment.[44]

Unfortunately, it is difficult to provide specific, empirically grounded data to answer Dworkin's question. In the absence of such data, some are reluctant to impose any governmental regulations on pornography. This group calls instead for such benign solutions as pornography boycotts. Unfortunately, those likely to be receptive to a boycott are those least likely to purchase pornographic materials in the first place. Furthermore, pornography boycotts in no way protect the public from the inevitable exposure and the harmful effects associated with public displays of pornography. Hence, a boycott by concerned citizens would likely do little to stem the current tide of violence associated with the pornography industry; a boycott by the enlightened will do little to protect men, women, and children from the impact public displays of pornography have on our society as a whole.

Concerned with this problem, some have called for a complete ban of pornography. This approach would meet with significant constitutional challenge, however. For example, the rights of free expression carefully protect the right to publish. That is, it is one thing to censor public displays of pornography but quite another to ban the publication of these materials. Susan Brownmiller writes accordingly:

> The distinction between permission to publish and permission to display publicly is an essential one and one which I think consonent with First Amendment principles....[45]

Additionally, complete bans of any form of expression seriously threaten audience's access to potentially valuable information. Because the proposal to ban pornography would deny audiences access to a whole category of expression, adoption of this proposal would seriously jeopardize vital First Amendment rights.

Brownmiller's sensitivity to such concerns, combined with her commitment to protecting civil rights, have led her to offer a compromise proposal. She would not prohibit the production of pornography. Instead, she calls for restrictions on the public display of its violent images. This compromise provides an attractive balance between free speech rights and the other civil rights in question.

Despite its initial appeal, however, Brownmiller's proposal faces several serious challenges. First, the concept of a "public display" is disturbingly vague. Indeed, should Brownmiller's proposal become law it is likely that courts would be forced to render findings similar to the question of state action in First, Fifth, and Fourteenth Amendment Cases. The Court would be forced to decide, for example, whether a private showing of pornography before a large audience constitutes a public display. Taken narrowly, the notion of a public display would include only advertisements, posters, billboards, news articles, and other materials "imposed" upon the public. Yet restrictions on such fare would do little to protect the public from those dangers described by social scientific research on the effects of pornography. In contrast, application of the broader notion of a public display would likely address many of the problems described by relevant social scientific research. However, application of this notion of a public display would deny everyone access to all pornography, thereby seriously endangering the "full capacity for individual choice which is the presupposition of First Amendment guarantees."[46]

A Reexamination of the Standard Debate

Despite these problems, Brownmiller's proposal provides a useful tool for our reexamination of standard arguments for and against placing restrictions on public access to pornography. The discussion below will graphically illustrate the impact introduction of the distinction between erotica and pornography has on the traditional liberal versus conservative debate.

One traditional liberal objection to any censorship of obscenity stems from the belief that such regulations will concede to:

> the communicators of debasing material a seductive power that we ought not be willing to grant.

> We should have more confidence in our ability to combat the effects of such communication without obliterating it.[47]

Interestingly, a similar argument has been presented on behalf of those who oppose all governmental uses of affirmative action guidelines to alleviate racial consciousness in our society.[48] The view that we should trust society to eliminate racial discrimination without governmental intervention is an appealing one, particularly to those of us deeply committed to limiting the role of government in private affairs. Yet hard evidence shows the direct correlation between recent governmental intervention in issues involving race discrimination and the significant improvement of minority persons' potential for full and meaningful existence in American society.

Similarly, as long as our society continues to be plagued with sexism and greed, research on the effects of pornography indicate that women and children may well need some form of institutional protection from publicly displayed endorsements for violent sexual activity. At minimum, social scientific research on the effects of pornography, like previous research on the impact of racism, requires us to reconsider our "confidence in our ability to combat the effects of such communication."

Haiman provides yet another traditional liberal argument against governmentally imposed restrictions on pornography:

> to whatever extent human beings possess impulses in the direction of 'higher' values--love, honor, respect, and healthful living--it ought to be possible through more and better communication to cultivate those tendencies and to demonstrate their superiority to 'baser' instincts. If we cannot achieve that by persuasion and example, we certainly cannot do so by coercion.[49]

This argument is a highly effective rebuttal to conservative arguments for placing restrictions on erotica. The argument weakens, however, in the context of Brownmiller's proposal. The Zillmann-Bryant research suggests, for example, that the elimination of public displays of sexual violence will likely contribute to more and better communication between the sexes. This better communication will likely cultivate our better tendencies and ultimately eliminate the seductive powers often attributed to pornography. Additionally, although adoption of conservative proposals for massive censorship would likely "coerce" the public into a given framework, it is difficult to see how adoption of a narrow version of Brownmiller's proposal to regulate public displays of pornography would do so.

Thus, when confronted with the distinction between erotica and pornography, traditional liberal opposition to governmental regulation of public access to obscenity faces new challenges. The traditional view of obscenity as all sexually explicit communication fails to allow adequate consideration of the impact increased levels of violence have on competing civil rights. This conceptual difficulty helps weaken traditional arguments against imposing restrictions of public access to obscenity.

At the same time, we must never forget that "suppression of communication that is presumed to have harmful long-term effects inevitably would prohibit much that is harmless for most people and would miss many other stimuli...that might in fact touch off bizarre behavior."[50] What is needed is a reformulation of liberal objections to censorship in light of the concerns raised by social scientific applications of the distinction between erotica and pornography. Such dialogue will better address the belief that the free speech principles underlying objections to censorship must not be overshadowed by the alleged harms imposed by exposure to pornography.

Recognition of such consideration no doubt inspired speakers at the 1979 New York rally organized by Women Against Pornography to call for "a new government commission which would fund nonsexist research on the effects of pornography, and which could draw up workable proposals for dealing with this serious and growing problem."[51] It is hoped that this essay's reconsideration of perspectives on pornography and free speech in light of the distinction between pornography and erotica will help guide such future research.

Endnotes

[1] Franklyn S. Haiman, *Speech and Law in a Free Society*, (Chicago: The University of Chicago Press, 1981), p. 40.

[2] Haiman, p. 39.

[3] Jerome A. Barron and C. Thomas Dienes, *Handbook of Free Speech and Free Press*, (Boston: Little, Brown, and Company, 1979), p. 608.

[4] *Miller v. California*, 413 U.S. 15, 47 (1973).

[5] Barron and Dienes, p. 615.

[6] Barron and Dienes, p. 626.

[7] Ruth McGaffey, "Anti-Pornography Campaigns: A Case Study," *Free Speech Yearbook: 1982*, (Annandale: Speech Communication Association, 1983), pages 27-40.

[8] These expressions all appear in Haiman, *Speech and Law in a Free Society* pages 165-171.

[9] McGaffey, p. 30, citing Alderwoman Hellen Kelley.

[10] Franklyn S. Haiman, "Nonverbal Communication and the First Amendment: The Rhetoric of the Streets Revisited," *The Quarterly Journal of Speech*, 68 (1982), p. 376.

[11] Haiman, "Nonverbal Communication and the First Amendment: The Rhetoric of the Streets Revisited," page 377.

[12] Haiman, *Speech and Law in a Free Society*, p. 171.

[13] From Justice Stanley Reed's opinion in *Winters v. New York*, 333 U.S. 507 (1948).

[14] Haiman, *Speech and Law in a Free Society*, p. 164.

[15] Haig A. Bosmajian suggests, for example, that because "the male is the most susceptible" to being 'corrupted' and

'depraved' by obscenity, censorship of obscenity would deprive the less corruptible "mature female population...of seeing or reading 'obscene' materials...." Bosmajian's acceptance of the traditional perception of obscenity leads him to express considerable concern for First Amendment rights. Furthermore, Bosmajian shows noteworthy sensitivity to the rights of women. However, like much of the scholarship which incorporates the liberal characterization of obscenity, Bosmajian's analysis does not include a discussion of the effects male susceptibility to pornography has on women's other civil liberties. Haig A. Bosmajian, "Obscenity, Sexism, and Freedom of Speech," *College English*, Vol. 39, No. 7, (March, 1978), pages 812-815.

[16] Haiman, *Speech and Law in a Free Society*, p. 168.

[17] See, for example, Don D. Smith, "Sexual Aggression in American Pornography: The Stereotype of Rape," paper presented at the annual meetings of the American Sociological Association, New York City, 1976, cited in Pauline B. Bart and Margaret Jozsa, "Dirty Books, Dirty Films," and Dirty Data, *Take Back the Night*, ed., Laura Lederer, (New York: William Morrow and Company, Inc., 1980), p. 213; and Neil M. Malamuth and Barry Spinner, "A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines," *The Journal of Sex Research*, Vol. 16, No. 3, (August, 1980), pages 226-237.

[18] Haiman, *Speech and Law in a Free Society*, p. 164.

[19] Dolf Zillmann and Jennings Bryant, "Pornography, Sexual Callousness, and the Trivialization of Rape, *Journal of Communication*, 32 (Autumn, 1982), p. 9.

[20] Gloria Steinem, "Pornography v. Erotica: A Clear and Present Difference," *Take Back the Night*, p. 37.

[21] From the majority opinion in *Miller v. California*, 413 U.S. 15, 43 (1973).

[22] Diana E. H. Russell, "Pornography and the Women's Liberation Movement," in *Take Back the Night*, p. 301.

[23] Feminists recently supported passage of a revised Minneapolis ordinance which defined certain types of violent pornography as a violation of women's civil rights. Tragically, one feminist--23 year old Ruth Christenson of Minneapolis--felt so strongly about this issue that she set herself afire to express concern over the harmful effects of pornography. Three days later, Minneapolis mayor Donald Fraser vetoed the pornography ordinance stating that it did "not lend itself to a clear-cut court test." Information from *Sacramento Bee*, July 12, 1984, p. A-3, and July 14, 1984, p. A-3.

[24] Irene Diamond, "Pornography and Repression: A Reconsideration," in *Take Back the Night*, p. 143.

[25] Carolyn Wood Sherif, "Comment on Ethical Issues in Malamuth, Heim, and Feshbach's "Sexual Responsiveness of College Students to Rape Depictions: Inhibitory and Disinhibitory Effect," *Journal of Personality and Social Psychology*, Vol. 38, No. 3, (March 1980), p. 411.

[26] Diamond, p. 138.

[27] Smith, p. 16.

[28] Neil M. Malamuth and Barry Spinner, "A Longitudinal Content Analysis," 227.

[29] See, for example, Pauline B. Bart and Margaret Jozsa, "Dirty Books, Dirty Films and Dirty Data," in *Take Back the Night*, pages 205-216.

[30] Dolf Zillmann, Jennings Bryant, and Rodney A. Carveth, "The Effects of Erotica Featuring Sadomasochism and Bestiality on Motivated Intermale Aggression," *Personality and Social Psychology Bulletin*, Vol. 7, No. 1 (March, 1981), p. 154.

[31] Pauline B. Bart and Margaret Jozsa, pages 205-216. See also Irene Diamond, "Pornography and Repression: A Reconsideration," in *Women: Sex and Sexuality*, ed., Catherine R. Stimpson and Ethel Spector Person, (Chicago: University of Chicago Press, 1980), pages 129-144.

[32] Diana E. H. Russell, "Pornography and Violence: What Does the New Research Say?" in *Take Back the Night*, p. 224.

[33] Neil M. Malamuth and James V. P. Check, "The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment," *Journal of Research in Personality*, 15 (1981), p. 437.

[34] Malamuth and Check, p. 436.

[35] Zillmann, Bryant, and Carveth, pages 153 and 158.

[36] Cited in Diamond, p. 141.

[37] Zillmann and Bryant, p. 10.

[38] Malamuth and Spinner, p. 235.

[39] Neil M. Malamuth, Maggie Heim, and Seymour Feshbach, "Sexual Responsiveness of College Students to Rape Depictions; Inhibitory and Disinhibitory Effects," *Journal of Personality and Social Psychology*, Vol. 38, No. 1, (March, 1980), p. 406.

[40] Russell, p. 237.

[41] Smith, P. 17.

[42] Smith, P. 18.

[43] See also, Neil M. Malamuth, Maggie Heim, and Seymour Feshbach.

[44] Andrea Dworkin, *Pornography: Men Possessing Women*, (New York: Perigee Books, 1981), p. 9.

[45] Susan Brownmiller, "Let's Put Pornography Back in the Closet," in *Take Back the Night*, p. 255.

[46] Haiman, *Speech and Law in a Free Society*, p. 179.

[47] Haiman, *Speech and Law in a Free Society*, p. 176.

[48] See the Court's majority and minority opinions in *Regents*

of the University of California v. Bakke, 76-811, U.S. (1978) for an interesting debate on this issue.

[49] Haiman, Speech and Law in a Free Society, p. 176.

[50] Haiman, Speech and Law in a Free Society, pages 175-176.

[51] Russell, p. 237.

X-RATED POLITICAL BROADCASTING: A TEST OF THE FIRST AMENDMENT

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An oft-quoted legal maxim holds that hard cases make bad law; that is, a decision that seems to be correct in a particular situation may set a poor legal precedent. When Larry Flynt, publisher of *Hustler* magazine, announced his short-lived candidacy for the Presidency, threatening to test an incongruity between provisions of the Communications Act of 1934 and the U.S. Criminal Code, bad law seemed certain to result. Indeed, the Federal Communications Commission (FCC) indicated it would solve the Flynt situation in a manner that would confuse further the area of obscenity and indecency law.

This area of the law is a quagmire of conflicting legal precedents. The quagmire affects not only judges and juries as they attempt to apply the law but also book dealers, theater owners, authors, broadcasters, and others as they attempt to conform their communication to the dictates of the law. However, the most important impact is the one least apparent--freedom of expression is, in this country, the foundation and the source of all other freedoms. Limitations, especially confusing or ill-conceived ones, on individual expression erode individual freedom. As Thomas I. Emerson, eminent First Amendment scholar metaphorically notes, "[t]o cut off the flow at its source is to dry up the whole stream."[1] Although the threat of Flynt--if indeed it was a threat--is over, the time is ripe for Congress or the Supreme Court to step into the area of political speech and of "indecent" or "profane" speech and resolve it in a manner that clarifies rather than confuses First Amendment doctrine.

The Law

Section 315 of the Communications Act provides that no licensee of the FCC shall have "power of censorship" over the material broadcast by a legally qualified candidate for public office.[2] The Supreme Court unanimously ruled in 1959 that the section actually barred any censorship by a licensee.[3] In two related cases, the FCC was asked to censor a spot broadcast by J. B. Stoner. In the first case he was a candidate for Senator from Georgia in 1972. The spot included the following language: "The main reason why niggers want integration is because the niggers want our white women.... This time vote your convictions by voting white racist J. B. Stoner into [office.]"[4] In 1978, the same candidate ran for governor, using substantially similar advertising. In both cases, the FCC ruled that under Sec. 315, the language could not be censored. In another case the Citizens party ran a spot during the 1980 Presidential campaign that stated in part, "Carter, Reagan, and Anderson. It's all bullshit! Bullshit!" In response to many complaints, the FCC held fast to the precedent of no censorship.[5]

The Communications Act also provides, in Sec. 312, that the FCC may revoke a station's license for failure to allow "reasonable access" to a "legally qualified candidate for Federal elective office" on behalf of his/her candidacy.[6] When read with Sec. 315, Sec. 312 makes clear that a station must allow access to qualified federal candidates and may not censor any material they propose to broadcast.[7]

The incongruity in this area of the law arises when Secs. 315 and 312 are compared to Sec. 1464 of the U.S. Criminal Code, which provides that whoever "utters any obscene, indecent, or profane language" by means of broadcast communications is subject to penalty.[8] The Commission is given power to impose sanctions for violation of Sec. 1464 as well.[9] Therefore, although licensees are not allowed to censor political broadcasts, Sec. 1464 seems to impose liability if any of the political spots they air are obscene, indecent, or profane.

Although a finding of profanity or indecency was not made in those cases, the FCC's treatment of stations involved in the J.B. Stoner and the Citizens party broadcasts seems to indicate that Sec. 315 overrides Sec. 1464. Indeed, in the area of defamation, the Supreme Court has held that Sec. 315 preempts state laws against defamation and creates an absolute privilege for the broadcaster against any liability the words of a candidate may cause.[10] On the other hand, federal law--Constitutional, statutory and administrative--always overrides conflicting state law. The provisions of federal statutory law involved herein are, in theory, of equal standing.

The final strand of the law that clouds this area is the Supreme Court rulings on obscenity, indecency, and profanity. The language of the First Amendment reads, in part: "Congress shall make no law...abridging the freedom of speech, or of the press." Although the language seems to be an absolute prohibition against laws restricting speech, few have interpreted the Amendment to mean just that.[11] Rather, a number of exceptions have been carved out. In *Chaplinsky v. New Hampshire*, the Court listed areas thought to be outside First Amendment protection: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very uttrance inflict injury or tend to incite an immediate breach of the peace."[12] *Chaplinsky* was decided in 1942; since that time, a number of cases have indicated that most of these are no longer without First Amendment protection. Obscenity, however, remains an exception to rights of free speech.

Although the best-known statement made in the area of obscenity is Justice Stewart's professed inability to define it but "know it when I see it,"[13] the Court has struggled for a long time to define this type of expression that, once identified, can be treated differently from other speech. Since 1973, the definition of the Court has been that articulated in *Miller v. California* as guidelines for determining what is obscene:

> (a) Whether "the average person, applying contemporary standards" would find that the work, taken as a whole, appeals to the purient interest...; (b) whether the work depicts or describes, in a

> patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[14]

A statute proscribing obscenity or instructions to jurors in obscenity prosecutions must conform to these standards in order to be upheld as constitutional. Although problems still arise with this definition, such as the variable standard for obscenity that results from applying "community standards," for our purposes, this standard is the one applicable to the "obscene" portion of the Sec. 1464 prohibition. The *Miller* case stands for the proposition that nonobscene speech may not be proscribed or punished constitutionally.

Sec. 1464 also prohibits the "profane." Although the *Chaplinsky* case lists profanity as outside First Amendment protection, cases since 1942 have held that language normally considered profane is protected, albeit without overruling *Chaplinsky*. The Court, in *Cohen v. California*, held that a young man walking in a county courthouse wearing a jacket embroidered with "Fuck the Draft" was exercising his freedom of speech and that his action and the words he chose to express himself were protected by the First Amendment.[15] This holding was repeated in a series of cases. In many, statutes that proscribed profanity or indecency were found constitutionally infirm.[16]

In a case testing a statute substantially similar to Sec. 1464, the defendant was convicted of violating Sec. 1461 of the U.S. Criminal Code, which proscribes mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, thing, device, or substance...." The Court construed these words to mean "obscene" under *Miller*; in that way, the statute was constitutional under the First Amendment.[17]

Section 1464, however, remained unrepealed and untested by the Supreme Court. In light of these prior cases, the statute seemed to many scholars and practitioners of the law to be unconstitutional in so far as it regulated anything but utterances that were obscene under the *Miller* standard. Prior to *Miller*, the FCC penalized stations for a variety of statements that were broadcast that the Commission deemed profane or obscene.[18] During this period, a number of minor penalties were meted out by the FCC, hoping to generate a test case. None of those penalized chose to appeal, however.[19]

This issue finally came before the Court in 1978. The FCC had penalized a Pacifica Foundation FM station for broadcasting a portion of George Carlin's "seven-dirty-words-you-can't-say-in-public" routine during a discussion of society's attitudes about language. The Court, in a decision that stands as an anomaly in light of the legal precedents, upheld the FCC.[20] The Court's reasoning is confusing; rather than acknowledging the prior decisions and explaining why Sec. 1464 is different from other statutes proscribing nonobscene speech (Carlin's seven words were not alleged by the FCC to be obscene under *Miller*), the majority opinion is a rambling essay discussing such things as nuisances in tort law, the hour the program was broadcast, the fact that children might be in the audience, and that broadcasting receives less constitutional protection than other areas under the First Amendment. The dissenters argue that, like *Hamling* and other previous cases, unless the statute is construed to prohibit only that which is obscene under *Miller*, it is unconstitutional.[21]

The contradiction between Sec. 1464 and Sec. 315 is even more acute in light of *Pacifica*. Why should candidates for public office be allowed to use "indecent" words when noncandidates are subject to criminal penalties for doing so or can be censored by a broadcast licensee? Surely the First Amendment should not be held to draw such silly and artificial distinctions. The spectre of self-avowed pornographer Larry Flynt's candidacy threatened further bad precedent in this area by presenting one of the worst factual situations imaginable.

Flynt Case

Larry Flynt is the publisher of *Hustler* magazine. He describes the publication as "pornography"--raunchier, more disgusting, more lewd, licentious and vile than anything on the market."[22] Advertising hyperbole aside, a glance through a copy of his publication confirms that this material is sexually graphic, violent, scatological, and intended to shock. Flynt has been prosecuted in several states on charges relating to *Hustler* and other pornographic publications he produces and has been convicted several times.[23]

In addition to pornography, Flynt has made a career of highly unconventional behavior that pushes normal conventions about public behavior and the tenets of the First Amendment to the limit. He has worn a flag wrapped around himself during a court appearance, shouted obscenities at a judge, and continues to publish harangues against authority. Although his announcement of candidacy for the Republican nomination for the 1984 Presidential election normally would have caused no more concern among broadcasters than did Pat Paulsen's candidacy, Flynt threatened to use pornographic material as a part of his campaign, bringing the anomaly in First Amendment law to public attention.

A Flynt candidacy squarely raises all the unsettled issues in the political broadcasting area of the law. If his campaign materials were printed or if he appeared in person, only nonobscene expression would be protected by the First Amendment. If Flynt created material to be broadcast under any guise other than political, Sec. 1464 would control, at least in the narrow factual situation of *Pacifica*--prohibiting "indecent" expression during times of the day when children are likely to be in the audience.[24] In addition, broadcasters simply could refuse to accept the spot and, absent fairness doctrine considerations, be within their rights to do so.[25] However, if the spot were from a legally qualified candidate for federal office, the interplay of Secs. 312 and 315 seem to force a broadcaster to air the material uncensored and yet be liable for criminal punishment under Sec. 1464.

The broadcasting community's response to the Flynt announcement included a number of calls to the FCC from worried licensees.[26] In response to this concern, and specifically to a query from Congressman Thomas A. Luken, the FCC staff drafted a legal memorandum that concluded that licensees should not be required under Sec. 315 to violate the criminal law. The memorandum is significant for what it fails to address rather than for this poorly documented conclusion.

The memorandum argues that the no censorship language of Sec. 315 was inserted to treat broadcasters like common carriers.

The latter have no obligation to break federal criminal laws, hence, the FCC staff argues, the legislative intent of Sec. 315 was that broadcasters are not required, in following equal opportunity law, to violate Sec. 1464.[27] The memorandum does not address the distinction between broadcasting and other free expression created by the indecency rule in *Pacifica*, the definition of indecent The Commission intends to follow, the question of what times children are "likely to be in the audience," or the question of profanity. The absurdity of the Commission's claim to follow the prohibitions of Sec. 1464 can be seen in the statute's inclusion of the prohibition against profanity--any viewer of television soap operas or listener of talk radio can attest that the FCC makes no apparent effort to bar profanity from the airwaves. The memorandum, in short, tells broadcasters they do not have to air Flynt's obscene political advertising, at least so far as the FCC legal staff is concerned. The full Commission has not voted on the issue.[28]

The memorandum is a classic "hard-cases-make-bad-law" document; it says, in effect, that broadcasters should act as if the confusion in the law does not exist. By dealing with Flynt in a way designed to cause the least public uproar, the quagmire of obscenity law is deepened.

Larry Flynt did not seek to air any obscene political broadcasts in the 1984 election. In the March, 1984 issue of *Hustler*, he announced he was a candidate no longer.[29] A fact that may have precipitated that announcement was his arrival at a federal prison in February to begin serving a fifteen-month term for contempt of court.[30] In fact, he was unlikely to have met the criteria for a "legally qualified candidate." According to the Commission's own rules and regulations, a candidate must be publicly announced, legally qualified to hold the office in question, and qualified for the ballot in the state in controversy or in ten states to be qualified nationally. State laws vary, but Flynt had not attempted to qualify as of his incarceration.[31] However, the elimination of this crisis should not be excuse to shelve the problem; Congress or the Supreme Court should seize the opportunity to rethink this important area of First Amendment law and make changes that establish healthy precedents for individual freedom.

Changes in the Law

A 1983 editorial in *Advertising Age* chastises broadcasters and the networks for their worry about what it terms "Flynt's bluff."[32] It accurately points out that the no-censorship provision is not a Constitutional prohibition but a statutory one that can be changed by Congress, adding that such a result clearly would happen if some future Flynt actually qualified under Sec. 312 for access to broadcasting facilities. The problems with this are: 1)what change should be made in the law and 2) how can the law be changed to improve rather than further confuse First Amendment law in general?

A variety of options are open in changing the law of obscenity, indecency, profanity, and political broadcasts. The first one, which would eliminate the broadcasters' fears, is to eliminate "equal opportunity" and "access" as a part of deregulation. The FCC already is considering this.[33] However, Secs. 312 and 315 of the Communications Act are statutory law; as a result, any binding amendments must be by Congress. The Senate Commerce, Science and Transportation Committee rejected a bill to repeal the fairness doctrine and equal opportunity, and similar legislation has been held up in a House subcommittee chaired by Colorado Congressman Timothy Wirth, a foe of deregulation.[34]

Deregulation would solve the immediate anomaly in the law and would save broadcasters from the bind between conflicting regulation; if they are not subject to Sec. 312, they do not have to air offensive material. In fact, Sec. 1464 prohibits it. However, this solution does not solve the anomaly between the obscenity law for all other speech under the *Miller* standard and the "indecency" rule for broadcasting under the *Pacifica* case or the further prohibition of "profanity" under Sec. 1464. Furthermore, Congress may not pass this portion of deregulation.

In addition, some strong arguments exist for keeping the access and the no-censorship and equal-opportunity provisions. If broadcasters are not required to air political material, then only the candidates the broadcasters support or those who offer the most money for advertising time might be given access to broadcasting facilities. In an age in which we already are concerned about the effects of the broadcast media on our lives and our institutions, such a result raises the spectre that networks or large media outlets could control elections.[35]

Another solution to the broadcasters' dilemma would be to retain Sec. 312 and those portions of 315 that require equal treatment of candidates but eliminate the no-censorship provision--the solution predicted in the *Advertising Age* editorial. This has drawbacks as well. Justice Black, writing for the majority in a case involving Sec. 315, argues that allowing censorship of political broadcasts could offend the intent of the First Amendment by giving a station that was so inclined the freedom to "inhibit a candidate's legitimate presentation under the guise of lawful censorship."[36] Although that case involved the question of station liability under state defamation laws, the same principle seems applicable to material censored under Sec. 1464.

Allowing censorship pursuant to Sec. 1464 clearly demonstrates the foundation of a problem the Supreme Court has been struggling with for years--how do you define obscenity, indecency, or profanity? If there is some form of speech that is so harmful or so worthless that it is undeserving of First Amendment protection, how do we define it so that people using the language, printing newspapers, running broadcasting facilities and making political statements will know if they are within the boundaries of permissible behavior? The *Miller* case defines *Obscenity*, but no case has done the same for *indecency* or *profanity*. Following Justice Stewart's rule, our intuitions tell us that the Citizens party broadcasting that used the word "bullshit" falls into the category of profanity, but J. B. Stoner's "white racist" statement does not. The irony is that many would find the former statement much less objectionable for themselves or their children to hear on the airwaves than the latter.

If you assume that all broadcasters act impartially (which, in light of the profit motive, is an unfair burden) and only exclude "offensive" speech from political broadcasts, the problem is not solved. As Justice Harlan points out in *Cohen v. California*, "one man's vulgarity is another's lyric."[37] The white racist statement of Stoner, or an argument in favor of abortion, or one against homosexuality may be deemed indecent by some; however, political opinion is precisely the speech the law is designed to protect.[38] If you assume that some broadcasters may act unfairly or unscrupulously, allowing censorship emasculates the purpose of equal opportunity by raising the possibility that a broadcaster might change a political message to suit his or her own purposes as the "price" of airing it.

To solve the problem of definitions, Congress might retain equal opportunity laws and, at the same time, adopt the recommendations of the 1970 report of the Commission on Obscenity and Pornography. The recommendations, after an extensive review of existing laws, problems, and research into the effects of pornography, were to abolish all laws against obscenity with the exception of protective legislation forbidding distribution through the mails or displays in open places that result in thrusting the material upon adults without their consent and prohibiting dissemination to children.[39] This solution would eliminate Sec. 1464 along with the rest of the anti-pornography legislation.

Although a blanket repeal of obscenity laws solves problems encountered by book dealers, theater owners and authors, it creates new problems for the broadcast media. Licensees would not be able to air the material for fear, quite well-founded, that children or unwilling adults would be in the audience. Therefore, they would continue to need guidance on what material fell into the prohibited category. In addition, this solution would be the most publically unpopular.

The problem that the Court recognized in Pacifica but did not address in a straightforward manner is the problem of privacy. The unwilling hearer or viewer always has caused questions in First Amendment law.[40] Unlike other means of communication, broadcasting "invades" the home. Although the Court in Cohen argues that those whose sensibilities are bombarded should avert their eyes, in Pacifica, where the obvious solution is to turn off the radio, the Court does an about face and forbids expression because it "assaults" sensibilities.[41] However, Carlin's records or the text of his monologue included within a book clearly could not be banned under Miller because a person of tender sensibilities bought the book or record unknowingly and was shocked when s/he encountered the undesirable language. This "assault" is the reason the Pacifica Court gives for punishing the expression.

The government cannot sanitize expression until it is palatable to the most sensitive ear or eye. Such blatant censorship destroys the foundation of freedom of speech. In fact, any line drawing is, of necessity, arbitrary; that is, what speech is so offensive to so many that it is ouside First Amendment protection? The final "censorship" must be done by the individual. The choices not to go to a movie, listen to a program, read a book, or sit through all three acts of a play are choices that, in a free society, belong to the individual or to the parents of a minor. One important aspect of individual freedom is not only the freedom to speak but the freedom to choose what you will hear. Privacy is the right to be let alone--to choose what you see and do--not the right to have the government protect you from all possible offensive communication.

However, the political realities of the current Congress and Supreme Court are that hard-core obscenity will not be tolerated in our society. Therefore, keeping the Miller obscenity standard and construing Sec. 1464 the same way as the Supreme Court has construed all other statutes prohibiting offensive speech would be the first step towards a rational First Amendment doctrine. As a result, Sec. 1464 would prohibit the broadcasting of obscene material. Prohibitions against profanity and indecency would be eliminated. Furthermore, the Pacifica case would have to be overruled in so far as it allows the prohibition of nonobscene speech. This action eliminates one anomaly in the law. Any other solution creates a precedent that in fact says that First Amendment protection lessens as communication's impact becomes more powerful, a poor rule for our most fundamental freedom.

The second step would be to amend Sec. 315 to forbid censorship of any nonobscene portions of a political broadcast. Obscenity would be determined by broadcasters under the Miller standard just as it is determined in all other areas of the law now. Larry Flynt would not be able to outrage much of the nation under the guise of running for federal office, if he were able to qualify to do so. And in any other determination of obscenity, the finding could be challenged in court if the candidate chose to do so. Stations would be liable under Sec. 1464 for obscene speech broadcast from their facility no matter whether it was part of a political spot or not. In the process of these changes, Secs. 315 and 312 would retain the access and equal opportunity provisions to ensure that fair coverage was given to all legally qualified candidates for office and that powerful media interests were not able to influence elections more than they do at present.[42]

The result of these changes, which some may find hard to accept, is that material may be broadcast that is offensive to some of us and that we deem unacceptable for our children. However, thoughtful consideration of what material is on television and radio now leads to the conclusion that unacceptable material is much broader than the sexual portrayals that usually comprise the category of indecency. As Justice Harlan points out in the majority opinion in Cohen, verbal cacophony is the price of freedom, a sign of strength:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the area of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry...and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[43]

Another political reality needs to be addressed in solving this problem. A current cry has arisen in the political arena, arguing for protection of the nation's children. A recent Supreme Court case, New York v. Ferber, reaffirms a variable standard for obscenity--a different definition of what is obscene for children than for adults.[44] Congress should, therefore, draft a specific statute that defines what is offensive as concerns children. With this definition established, two alternatives exist. One is to designate children's viewing hours, for example 3:30 p.m. to 8:00 p.m. on Monday through Friday and 8 a.m. to 8 p.m. on Saturday and Sunday. During those hours, the applicable obscenity standard would be that which Congress has drafted. During regular hours, *Miller* is the applicable standard.

Another solution is to have a ratings board for broadcasting similar to the movies. Then parents, on behalf of children, or individuals can check program guides and choose programs that they deem acceptable. Material that enters our homes via the airwaves is even easier to regulate than averting our eyes; we can exercise choice in what we and our children hear simply by turning to another channel or tuning the television or radio off. In this matter, we can regulate whatever offends us, be it profanity, violence, or inanity.

With these changes in the law, broadcasters still are free to refuse to air programs or information that is nonobscene so long as it isn't political material under Secs. 312 and 315. Further, the chance of a legally qualified candidate for federal office seeking to air obscene spots is fairly remote. Should the possibility arise, Sec. 1464 prevents it. However, the removal of "indecent" and "profane" from that statute may result in more sexually explicit material and more offensive language being broadcast. However, broadcasters are sensitive to the desires of both audience and advertisers; they are constrained to act responsibly by financial considerations if not moral ones.

The only other problem these changes in the law would bring about is the "community standards" section of the *Miller* obscenity definition. If a candidate challenged a censoring of his or her material based on finding of obscenity, what community standards would the jury use to determine if, in fact, the material in question is obscene? Given the nature of the broadcast facility, the answer seems to be that the jury should consider the community the program is seen in--local or national. Although some difficulty in determining national standards of what appeals to the purient interest may arise, certainly the task is less difficult than that faced by a broadcaster under current law--what is indecent or profane--with no legal guidance.

The First Amendment is the bulwark of our democratic system of government, and any limitation upon free speech is an inroad upon that democracy. As noted First Amendment scholar Thomas I. Emerson has said, the "lesson of experience, in short, is that the limitations imposed on discussion...tend readily and quickly to destroy the whole structure of free expression."[45] While none of us, or at least very few of us, want the type of material Larry Flynt produces bombarding our living rooms after the evening news, we must not allow the cure to be more dangerous than the problem. First Amendment protection means nothing if it does not protect the dissenting voice, the "offensive" point of view.

Endnotes

[1] Thomas I. Emerson, *The System of Freedom of Expression* (1970; rpt. New York: Random House, 1971), p. 9.

[2] 47 U.S.C.A. Sec. 315.

[3] *Farmers Educational and Cooperative Union of America v. WDAY*, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959).

[4] *Letter to Lonnie King*, 36 F.C.C.2d 635, 22 R.R.2d 54 (1972); See also, *Julian Bond*, 69 F.C.C.2d 943, 43 R.R.2d 1015 (Bd. Bur. 1978).

[5] Marc A. Franklin, *The First Amendment and the Fourth Estate* 2nd ed. (Mineola, N.Y.: Foundation, 1981), p. 635.

[6] 47 U.S.C.A. Sec. 312 (a) (7).

[7] The D.C. Circuit Court of Appeals has concluded that the provision means a broadcaster cannot refuse *paid* uses; Sec. 312 (a) (7) does not obligate a licensee to give free time to candidates. See *President Committee v. FCC*, 636 F.2d 417 (D.C. Cir. 1980).

[8] 18 U.S.C.A. Sec. 1464. This provision was originally a portion of Sec. 326 of the Communications Act. In 1948, it was removed and added to the criminal code.

[9] 47 U.S.C.A. 503 (b) (1) (E).

[10] *Farmers Educational*, 79 S.Ct. at 1412.

[11] Among the few, see Justice Black's dissent in *Ginzburg v. U.S.*, 383 U.S. 463,476 (1966) and Alexander Meiklejohn, "The First Amendment is Absolute," *Supreme Court Review* (1961), p. 263.

[12] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 86 L. Ed. 1031, 1034-35 (1942).

[13] See Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 804 (1964).

[14] *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607 (1973).

[15] *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780 (1971).

[16] See, for example, *Gooding v. Wilson*, 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972); *Brown v. Oklahoma*, 408 U.S. 914, 33 L.Ed.2d 326, 92 S.Ct. 2507 (1972); *Plummer v. Columbus*, 414 U.S. 2, 38 L.Ed.2d 3, 94 S.Ct. 17 (1973); *Hess v. Indiana*, 414 U.S. 105, 38 L.Ed.2d 303, 94 S. Ct. 326 (1973); and *Papish v. Bd. of Curators of the University of Missouri*, 410 U.S. 667, 35 L.Ed.2d 618, 93 S.Ct. 1197 (1974).

[17] *Hamling v. United States*, 418 U.S. 87, 41 L.Ed.2d 590, 609-617, 94 S.Ct. 2887 (1974).

[18] See, for example, *Pacifica Foundation*, 36 Fcc 147 (1964), and also *Eastern Educational Radio*, 24 F.C.C.2d 408, 18 R.R.2d 860 (1970) and *Sonderling Broadcasting Corp.*, 27 R.R.285 (F.C.C. 1973).

[19] See, *Eastern Education Radio*, and *Sonderling*.

[20] *Federal Communications Commission v. Pacifica*, 438 U.S. 726, 57 L.Ed.2d 1073, 98 S.Ct. 3026 (1978).

[21] In a stinging dissent, Justice Brennan argues: "It is quite evident that I find the Court's attempt to unstitch the

warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers Powell and Stevens another vein that I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain." 57 L.Ed.2d at 1110.

[22] Larry Flynt, "Larry Flynt on Freedom of Expression," *Hustler* (March, 1984), p. 161.

[23] "A Bad Case Makes Worse Law," *Time*, 21 Feb. 1977, pp. 51-52 and "A Smut Peddler Who Cares?," *Newsweek*, 14 Nov., 1983, p. 58.

[24] A Supreme Court case in 1982 cites *Pacifica*: "Most recently, we held that the government's interest in the well-being of its youth justified special treatment of indecent broadcasting received by adults as well as children." *New York v. Ferber*, 102 S.Ct. 3348, 3354-55 (1982).

[25] For discussion of the fairness doctrine, see *Fairness Report*, 48 F.C.C.2d 1, 30 R.R. 2d 1261 (1974) and "The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas," 44 *Ford. L. Rev.* 877 (1976).

[26] "Flynt Causes X-Rated Worry," *Broadcasting*, 21 Nov. 1983, p. 59.

[27] FCC, "Memorandum," 14 Jan. 1984, attached to Mark S. Fowler, Letter to Honorable Thomas A. Luken, 19 Jan. 1984, pp. 3-4.

[28] Mark S. Fowler, Letter to Honorable Thomas A. Luken, 19 Jan. 1984, p. 1.

[29] Larry Flynt, "The Desecration of America," *Hustler*, March 1984, p. 7.

[30] "Goes to Prison," *Denver Post* 2 Feb. 1984, Sec. A, p. 2, col. 4.

[31] See 69 F.C.C.2d 2228-29 (1978).

[32] "Calling Larry Flynt's Bluff," *Advertising Age*, 14 Nov. 1983, p. 16.

[33] See *Congressional Quarterly Weekly Report*, 7 June 1984, p. 1604.

[34] *Congressional Quarterly Weekly Report*, p. 1603.

[35] In the print media, the editor or publisher has total discretion as to who has access to the paper.

[36] *Farmers Educational*, 3 L.Ed.2d at 1412.

[37] *Cohen*, 403 U.S. at 18.

[38] FCC v. League of Women Voters, discussed in Congressional Quarterly Weekly Report, 7 Jul, 1984, p. 1662.

[39] The Report of the Commission on Obscenity and Pornography (N.Y.: Bantam, 1970).

[40] See, for example, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

[41] Cohen, 29 L.Ed.2d at 292 and Pacifica, 57 L.Ed.2d at 1093.

[42] The FCC recently moved to eliminate the "sevens" rule whereby a licensee is limited to owning seven AM, seven FM, and seven TV stations. The Commission proposes to move the limit to twelve, thereby making large communication conglomerates even more pervasive in the market.

[43] Cohen, 29 L.Ed.2d at 293.

[44] New York v. Ferber, 102 S.Ct. 3348. "Variable Obscenity" was first posited in Ginsberg v. New York, 340 U.S. 629 (1968).

[45] Thomas I. Emerson, p. 11.

FREEDOM OF SPEECH AND THE FEDERAL ELECTION CAMPAIGN ACT; THE PROBLEMS OF REFORM LEGISLATION

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Since before we formed our own nation, Americans have believed in the idea of reform, the notion that by teaching the appropriate precept, designing the needed gadget or passing the appropriate law most any problem can be solved. To that end ancestors calling themselves "Puritans" set sail for a new world. Later, being dissatisfied with the new country's Articles of Confederation, some of the Puritans' descendants wrote our constitution that we might form a "more perfect" union. Whatever the issue--trade, slavery, labor disputes, women's rights--when Americans decide something needs fixing, they complain to their Congressman, "there ought to be a law." While the list of successful legislation is impressive (e.g. The Civil Rights Act of 1964, child labor laws, the Homestead Act, the Bill of Rights) not every reform (recall prohibition) succeeded.

In this essay, exploring some consequences of the Federal Election Campaign Act, I shall argue that the FECA is one reform Americans could do without. En route to that unhappy conclusion, we will examine the act as passed and amended in response to judicial review, as well as the first amendment issues of public disclosure, campaign contribution and expenditure limitations, independent expenditures, and FECA administration. We begin with a review of the problems to which the FECA is addressed.

Political Equality and Election Integrity: Objectives of the FECA

Who should hold political power in the new United States of America? James Madison in Federalist No. 57 answered "Not the rich, more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people...."[1] And U.S. Circuit Court of Appeals Judge J. Skelly Wright has observed that our political history reveals a long list of significant steps taken toward realization of "the ideal of political equality."[2]

Those steps include constitutional amendments which extended the franchise to former slaves in the 19th century and women early in the 20th. They included Supreme Court decisions such as the one that struck down the poll tax. In that move toward political equality the justices said "Wealth, like race creed, or color, is not germane to one's ability to participate intelligently in the electoral process."[3] More recently "the one person, one vote decision" of 1964 required states to equalize the populations of electoral districts.[4] A year later, urged on by the civil rights movement and President Lyndon Johnson, Congress enacted the Voting Rights Act of 1965 to insure that black citizens could in fact register and vote. In 1972 the Supreme Court declared unconstitutional a Texas law that required political candidates to pay high filing fees.[5] And in a related case (*Lubin v. Panish*, 1974), invalidating another filing fee requirement, Chief Justice Warren Burger said the American "...tradition has been one of hospitality toward all candidates without regard to their economic status."[6]

Although agreeing strongly with Burger's formulation of the goal (equality in the electoral process), experts on the financing of political campaigning are likely to respond, "Oh that it were so." They contend that in actuality the hospitality of the political arena is very much a matter of economic status. The power of great wealth, they maintain, runs counter to the struggle for political equality. It follows, that public policy regulating political campaigns should, in the words of former Congressman and sometime presidential candidate John Anderson, restrict "...the influence of wealthy and special interest contributors."[7]

Otherwise, wrote law professor Marlene Arnold Nicholson, in the absence of limitations upon their campaign spending the rich and powerful "...are able to drown out the voices of the less affluent in the political arena."[8] Therefore, she continued, such limits "...actually serve the cause of disseminating information from diverse and antagonistic sources."[9] In short reformers argue that government regulation of campaign financing is at once necessary and honorable. For them the promotion of political equality is an important justification for restricting campaign contributions and spending on the one hand and public financing of election campaigns on the other.

Statutory regulation including mandatory public disclosure of monetary receipts and expenditures, limitations on the dollar amounts of campaign contributions and similar legal requirements are also an important defense against corruption. Many thoughtful commentators are convinced that in politics money is a potent and, more worrisome, a pernicious force. "Its power to corrupt the system is total; unrestrained by law, it most certainly will corrupt;" so wrote Professor of law Edwin Brown Frimage and his Congressional campaign manager Kay Christensen.[10]

When an individual or organization can donate tens of thousands of dollars to a particular Senator's campaign, then the likelihood of a *quid pro quo* for the Senator's committee work or vote on a given *bill* is substantial. Even if both the giver and receiver of huge campaign contributions were a hundred percent pure, the appearance of impropriety would remain. Since appearances lead to perceptions and perceptions, particularly in politics, shape our public beliefs, the maintenance of public confidence is put forth as ample justification for governmental regulation of political campaign finance.

Most authorities agree that insuring the integrity of the electoral system is a compelling government interest. Late in the 1960's and through most of the 1970's many public officials and a host of public interest groups became increasingly alarmed by what they saw as the unhealthy or even dangerous influence of big money in electoral campaigns. John Gardner's Common Cause, for instance, succeeded in focusing media attention on the apparently unhealthy influence which well-organized lobbies exercised by financing the reelection of already well-entrenched Congressional committee chairs. The ability of those Congressmen (they were in fact all *men*) to raise large sums of cash, precluded the possibility of any opponent giving them a run for the money, much less defeating them at the polls.

Under heavy pressure from "good government" groups (e.g. The League of Women Voters) Congress somewhat reluctantly passed the Federal Election Campaign Act of 1971. That relatively modest legislation required the public disclosure of contributions to and expenditures by committees organized to conduct congressional and presidential campaigns.

Then came Watergate, perhaps the worst scandal in American political history. The public was disgusted; the reformers clamored for legislative remedies. Congress was compelled to pass and Richard Nixon to sign the far reaching FECA amendments in 1974. (Almost no one seemed to notice that the real crimes in Watergate--breaking and entering, theft, secret contributions, perjury and obstruction of justice--were *already* crimes; and that what the country needed was aggresive enforcement of existing laws rather than passing new ones.) Those amendments created an independent Federal Election Commission which was empowered to administer and enforce the statute. The amendments provided stronger disclosure requirements, limited the size of legal contributions to political candidates and committees, and restricted the amount candidates could spend in campaigns for federal office. Simultaneously, Congress passed a related act which initiated public funding for presidential campaigns. These statutes, which have been fairly characterized as the most "comprehensive legislative reform of campaign financing in this country's history," became effective on January 1, 1975.[11]

While it was the historic and unhappy events of Watergate that impelled Congress to enact the FECA amendments, there were--and still are, important policy arguments in support of the act. An informed and competent electorate is necessary, if a people are to govern themselves. "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare, that, in theory, casting a ballot is assumed to express," wrote Alexander Meiklejohn.[12] Free speech, he believed, is the instrument by which those admirable traits develop and is, therefore, what makes effective self-government possible. In that opinion he was echoing such eminent jurists as Louis Brandeis who held that "freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth...."[13] In Meiklejohn's theory freedom of speech is instrumental to the process of self-government. Consequently in his view the First Amendment "is not the guardian of unregulated talkativeness....What is essential is not that everyone speak but that everything worth saying shall be said."[14] For if "everything worth saying" is said, the listeners will be well informed and able to govern themselves.

The question was, "Did the 1974 FECA amendments unconstitutionally restrain freedom of speech and association?" Opponents thought they did and so on January 2, 1975, one day after the amendments became law, they filed suit to prove it. As provided for within the amendments themselves the case was expedited through the Federal District Court and Court of Appeals; on November 14, the Supreme Court heard oral arguments.[15] Two and a half months later in *Valeo v. Buckley*, the High Court struck down important provisions of those amendments.[16]

Among the provisions voided was the structure of the Federal Election Commission itself. The act had empowered Senate and House leaders to appoint four of its six FEC members; this the high Court observed was contrary to article II of the Constitution which says it is the President who shall appoint federal officers. The majority decision also struck down the FECA's restrictions on Congressional campaign expenditures. Other significant provisions of the legislation including limitations on campaign contributions and the public funding of presidential campaigns were sustained.[17]

The Supreme Court's decision was handed down in February of 1976, when the Presidential primary season was well underway. Consequently, the Court gave Congress six weeks to rewrite the statute to have the Commissioners appointed by the President, and otherwise adjust the act to the Court's ruling. This was done so that the Commission could continue operations. Largely because of partisan bickering the rewriting took twelve weeks. Meantime Commission was "out of commission," and, therefore, unable to dispense the public funds for the primary election campaigns that were then in progress.

Predictably perhaps, the First Amendment pronouncements which the Court articulated in *Buckley* seemed to raise as many questions as they answered. The Court's argumentation did not appear to flow from any consistent set of principles or coherent singular view of the first amendment. In any event the Court was unable (or unwilling) to develop a compellingly consistent position on the fundamental question of whether or not government can constitutionally regulate political campaign finance. Instead it opted for a "piecemeal" analysis testing each particular segment of the act against the given constitutional principles. Let us examine important elements of that decision and some of the problems which derive therefrom. We can begin with the high Court's pronouncements regarding the issue of public disclosure, the requirement that campaign contributions and expenditures be reported to the FEC for public inspection.

Public Disclosure:

On the premise that the pitiless cleansing power of the sunlight would discourage (or at least reveal) improper and illegal behavior the Court upheld the FECA's public disclosure provisions. Opponents of the act had argued that the disclosure provisions constituted an invasion of a contributor's privacy and would, therefore, discourage potential contributors from supporting the candidates they might favor. In particular, plaintiffs contended that public disclosure would handicap fund raising by unpopular minority parties. Although it refused to give such parties the blanket exemption from the act's disclosure requirements which appellants sought, the Court did hold that if given parties could show a "reasonable probability" that disclosure would subject the party's contributors to threats, harassment or reprisals in violation of their First Amendment rights of association, then exceptions could be allowed on a case by case basis.[18]

In the years since Buckley such relief has occasionally been granted--albeit over the Federal Election Commission's objections. For example, the National Socialist Workers Party filed a suit in the Federal District Court for the District of Columbia seeking exemption from the act's disclosure provisions and eventually reached a settlement with the FEC in which the party was permitted to hold the list of its contributors in confidence for a period of six years. To win that modest victory the party had to wage a two and one half year long legal battle. In the course of litigation the party introduced evidence showing that the F.B.I. had spied upon and otherwise tried to disrupt the party's functioning in previous years.[19] In other words the party had to prove that it had actually suffered in the past in order to gain relief from the FECA's disclosure provisions.

This would seem to be a heavy burden of proof, one that other minor parties will be unable to carry And obviously no new political party could present evidence of that sort, for it would have no past into which government or malicious private persons could have intruded. It follows, that the "probability of harassment" standard does not adequately address the chilling effect which the expectation of disclosure will have on prospective donors to such new parties. Furthermore the financial burden, the delays and the uncertain outcome of the litigation which minor parties must pursue to obtain exemption from disclosure, renders even a successful suit an ineffectual remedy. So Buckley's criteria for the granting of exemptions to the FECA's disclosure requirements remain, as Michael D. Esch has observed, "conceptually and practically" inadequate as they applied to minor parties.[20]

More seriously, it is not easy to discern what vital government interest is served by requiring tiny parties to disclose the names of their contributors at all. For incumbents and major party candidates who have a reasonable chance of becoming office holders, the rationale is straight forward "sunshine" discourages corrupt connections between the donor and the likely election winner. But minor party candidates are not going to win in Presidential or Congressional elections. So they are not going to be in any position to betray a public trust. I conclude that there is no compelling state interest to be served by forced disclosure of contributions to, say, the Libertarian candidate for President or the Peace and Freedom party's nominee for a Senate seat.

Furthermore, this interpretation of the matter seems to be consistent with the Supreme Court's decision in the important case of First National Bank of Boston v. Belloti. In that case decided two years after Buckley, the High Court struck down a Massachusetts statute which forbade corporate expenditures in opposition to ballot initiatives.[21] Writing for the 5 to 4 majority, Justice Powell said that such expenditures constituted an exercise of protected free speech and thus could be constrainted only in the pursuit of some significant governmental interest. The Commonwealth of Massachusetts attempted to justify the statute on grounds that it protected minority stockholders who disagreed with the management's politics and that limiting the amount a corporation could spend would prevent them from using their vast wealth to drown out the voices of individual citizens. Justice Powell found all these arguments insufficient.[22]

Then he addressed the one compelling state interest which was the basis for upholding election campaign limitations in Buckley, namely the interest in preventing corruption. Powell concluded. "The risk of corruption perceived in cases involving candidate elections...simply is not present in a popular vote on a public issue."[23] Although Powell didn't explicitly say so, the reason that there was no risk of corruption is patent: in a referendum there is no public officer to be corrupted. And I submit the same rationale can be applied to relieve minor party candidates and their supporters from the burdens of public disclosure, for there is no chance that those candidates are going to be elected.

If this line of reasoning were accepted and minority parties given the blanket exclusion from public disclosure which I believe they should have, then it would be necessary to provide some systematic and unbiased means of determining how large a party would need to be before it would have to disclose the names of its contributors. While the drafting of legislation is beyond the bounds of this essay, the guiding principle for this determination resides in the preceding analysis: when a party gets large enough that there is some likelihood that it might elect an official then it should be compelled to disclose the nature and sources of its wealth. The FECA might be amended to provide that a party must begin disclosure, it it garners say 15% of the votes in a previous election or has registered say 15% of the voters in a constituency for the next one. This sort of scheme would enable citizens who support fringe parties to maintain their privacy until that party had appreciable backing.

Disclosure would still be required before a party elected any candidates, and, so, before there was any risk of corruption. In addition the disclosure would occur only if a party had obtained substantial backing. Then the likelihood of contributors suffering persecution should be much less than it is when the party is little known and poorly understood. To sum up it would appear that there is no compelling government interest strong enough to justify the chilling effects which the FECA's public disclosures provisions have on the freedom of speech and association of those would support splinter parties in federal elections.

Moreover, there are affirmative public policy arguments to be made on behalf of minor parties. Rather than reiterating the conventional wisdom, the spokespersons of minority parties add to the diversity of public discourse. So they help insure that the public will hear what needs to be said. Often times their ideas are frivolous, but sometimes they are at the leading edge of economic, social or political reform. Students of American politics have long recognized that, although they fail to elect their own candidates, third parties frequently articulate policies that are later adopted by major parties and eventually enacted into law by the Congress. The Supreme Court acknowledged this important function of minor parties in Sweezy v. New Hampshire.[24]

Though the grounds for granting minor parties a blanket exclusion from the FECA's public disclosure provisions are solid, there are at least two reasons why the Congress is unlikely to enact one. First, members of Congress have to "tell all" themselves and they will have little sympathy for protecting the anonymity of people who help their partisan opponents; second by definition splinter parties have little clout on Capitol Hill.

Consequently, if this defect in the FECA is going to be corrected the Court will have to do it. And as we shall presently discover the free speech issues deriving from its public disclosure requirements are by no means the most offensive aspects of the act.

Expenditure and Contribution Limitations:

More ominous were the FECA's clear and conservative restrictions on the amount of money which individuals and groups could contribute to candidates for federal office and the amounts which candidates could spend in primary and general elections.[25] As we observed the primary objective for this legislation was to end corruption. There were secondary objectives as well. Proponents wanted to reverse the recent growth of campaign spending. Much of that money went to consultants, advertising agencies, film makers and assorted other "image makers," who were as unpopular with career politicians as with the public. Finally, supporters of the 1974 FECA amendments believed that the spending restrictions would tend to equalize the relative capacity of wealthy and less affluent individuals and groups to influence the outcome of federal elections.

So it was said that the spending limits would promote the First Amendment objective of promoting diversity in public discourse. Of such thinking the Supreme Court majority would have no part: "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is *wholly foreign* to the First Amendment."[26] Quoting the Court's famous pronouncement in *New York Times Co. v. Sullivan*, the justices observed that the First Amendment's very purpose is "to secure the widest possible dissemination of information from diverse and antagonistic sources,"[27] but not to do so by limiting the output of any potential source.

In addition to restricting how much senatorial and congressional candidates could themselves spend on their own campaigns the 1974 amendments restricted the sums which other individuals or committees could expend on their own in "advocating the election or defeat" of "a clearly identified candidate" to the sum of one thousand dollars.[28] Congress' reason for outlawing these so-called "independent expenditures" was to prevent circumvention of the limits placed on candidate spending. In determining that restrictions on "independent expenditures" were likewise unconstitutional the Court observed, first, that the low limitation would preclude meaningful participation in a campaign. The majority noted that the $1,000 limit on spending by an individual wouldn't buy a single quarter page advertisement in a major metropolitan newspaper.[29] The Court went on to say that the primary justification for limiting campaign *contributions*, namely the government's interest in preventing corruption and the appearance of corruption, could not be used to sustain the independent spending limitations, for unlike campaign contributions "independent expenditures" would not create a *quid pro quo* between the candidate and person or committee placing making the expenditure.[30]

Although it struck down the FECA's limitations on candidate and independent campaign spending, the High Court upheld the FECA's ceilings on the size of federal election campaign contributions ($1,000 from individuals, $5,000 from committees supporting multiple candidates).[31] Consequently, the

Court was also obliged to draw an argumentative and constitutional distinction between two uses of money in politics *spending* it to communicate opinions directly and *giving* it to candidates to communicate them indirectly. The distinction was made on two grounds, first the majority agreed with Congress that limitations on *contributions* were needed to prevent the actuality or appearance of corruption. "We find," the court said, "that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling."[32] In short, limits on contributions *are* an infringement on free speech, but that infringement serves a compelling government interest, namely maintaining the integrity of the electoral system. Second, the Court held:

> a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for their support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.[33]

What the Court seemed to be saying is that a contributor is not articulating arguments but merely announcing--for example--"I like Ike" or "We favor Mondale." The contributor's constitutional right to make that statement via the checkbook can be restricted in the interest of combating corruption. Congress said an individual can donate $1,000 and an organization can give $5,000 and the justices found that a reasonable exercise of state power. Whether the contributions-expenditures distinction makes good sense or good law is a question to be resolved.

The Contributions/Expenditures Distinction

Chief Justice Burger, who in *Buckley* presented his own opinion concurring in part and dissenting in part, thought the majority had made a distinction without a difference. "We do little but engage in word games," he wrote, "unless we recognize that people--candidates and contributors--spend money on political activity because they wish to communicate ideas and their constitutional interest in doing so is precisely the same whether they or someone else utter the words."[34] Burger would have struck down the limits on contributions. It is worth noting that Justice Byron White agreed with Burger that contributions and expenditures should be treated similarly but said money is not speech and voted to uphold the limitations on both spending and giving.

Another reading of the distinction leads to the conclusion that speech by the self deserves less protection than communication via a representative. By this principle one could also argue that ghost written speeches are not entitled to full first amendment protection. Such a doctrine would seem to discriminate against the mute, the inarticulate, the poorly educated or others who need to hire others to speak for them.

Other important problems arise directly from the Court's decision to uphold limits on campaign contributions while striking down the limitations on campaign expenditures. One is the problem I call *mandated inequity*. As amended in 1974 the FECA restricted the amount which candidates and their immediate families could collectively spend on their own campaigns. While the $35,000 limit for Senatorial campaigns was more than many families could donate, it would have precluded families of great wealth from spending hundreds of thousands in the attempt to "buy" a Senate seat. But that restriction, like all the campaign spending limitations, was struck down. Consequently, John Heinz--he of the 57 varieties fortune--and his family could pour more than a million dollars into his successful run for the Senate in 1980.[35] In the days before contribution limitations he would have had that same advantage, but his opponent would have had at least the chance of finding one or more big donors to offset Heinz's personal wealth. No more. Contributors are limited to $1,000. Under *Buckley* it is much better to be rich than to have rich supporters.

Similarly, as the law now stands it is more useful for a senatorial candidate to be supported by, say, ten independent county realty boards which each contribute $5,000 than by a state board with members from 50 counties that is prepared and able donate $50,000. The latter board, like the former, can legally give no more than $5,000 to a congressional or senatorial campaign. (But in situations of this kind those local boards would have to be actually independent of any state or national organization which contributed to the same campaign.)

Though one can argue that an incumbent Congressperson might be more responsive to the legislative agenda of a group that gave $50,000 than one which donated $5,000, in this case we seem to again have a distinction without a difference, because the agendas of the county associations for an industry are most likely to parallel that of a state organization. Consequently, if, to continue the example, the realtors of California want to be in the best position to help their legislative allies, they should organize on the local level only. On the other hand, the First Amendment guarantees freedom of association, so what business has the Congress telling people how to organize?

Since 1976 the Court has heard two important cases which deal with the contributions/expenditures distinction set forth in *Buckley*. In the previously mentioned *First National Bank v. Bellotti* the Court invalidated a Massachusetts state statute which forbade both corporate spending and corporate contributions to influence any referendum which would not materially affect "any property, business or assets of the corporation."[36] In *Bellotti* the Court found the statute could not be justified. Massachusetts defended the statute on various grounds. It asserted that with their vast wealth corporations could vastly outspend unorganized individuals, monopolize the channels of communication, and thereby dominate the public debate. It was also argued that corporate funding of one side of an initiative would violate the rights of minority stockholders.

The Court rejected these contentions.[37] It found that the primary justification for limiting contributions in candidate elections, namely the prevention of corruption, "simply is not present in a popular vote on a public issue."[38] Consequently, corporations may legally spend an unlimited amount of money directly supporting or opposing a ballot issue. Similarly they--and one supposes other organizations and individuals as well--could *contribute* unlimited sums to a committee created to support or oppose a referendum measure. Moreover *Bellotti*, although addressed directly to campaign *expenditures* may be seen as narrowing the policy aspect of the *Buckley* decision which upheld the campaign *contribution* limitations of the FECA.

That *Bellotti* did indeed foreshadow such a narrowing was confirmed in *Citizens Against Rent Control v. Berkeley*.[39] An ordinance of the City of Berkeley, California limited the size of contributions to committees supporting or opposing ballot measures to $250. *CARC* received several such donations and then obtained a temporary restraining order which prohibited enforcement of the ordinance. On appeal the Supreme Court struck down Berkeley's ordinance on grounds that it infringed on appellant's rights of both association and expression.[40] Chief Justice Burger speaking for the 8 to 1 majority repeated the *Bellotti* argument that in ballot elections there is no risk of creating a *quid pro quo* between the donor and a public official and, therefore, no compelling government interest to sustain the ordinance's infringement on free speech.[41]

Taken together *Bellotti* and CARC have surely blurred the *Buckley* distinction between the permitted limitations on *contributions* and unsanctioned limitations on *expenditures*. At present it appears that the only limitations which the Court is likely to sustain are those giving to candidate committees. Business law professor Eric Richards goes so far as to claim, "the Court may well have reversed *Buckley's* approval of contribution limits in a candidate election."[42] In a careful reading, Richards' rationale for that conclusion is unpersuasive, but as a proponent of free and robust debate in the political arena, I'm inclined to hope that he is correct.

Independent Expenditures

For advocates of robust and wide open debate a promising element of the *Buckley* decision was the Court's decree on the so-called "independent expenditures." Independent expenditures are those made by persons or groups who *on their own* engage in "campaign" activities which support or oppose given candidates. Asserting that such spending posed little danger of corruption, the justices in *Buckley* struck down these limitations because those limits were found to "heavily burden" the spender's First Amendment rights. "Advocacy of the election or defeat of candidates for federal office," the High Court found, "is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."[43] Agreed. Unfortunately, however, there is less to this declaration of *Buckley* than first appears. For to be "independent" expenditures must indeed be made in a fashion that is *independent* of the candidates' campaigns. Otherwise the FECA as amended in 1976, in response to *Buckley*, redefines that spending as a "contribution" subject to the $1,000 or $5,000 limitation.

The 1976 amendments, I shall attempt to show, lay a heavy burden on our First Amendment rights of expression and association. The restrictions on those rights prevail whenever a person or group spends more than $250 in order to "expressly advocate" the election or defeat of a "clearly identified candidate."[44] When that $250 threshold is reached, the person(s) or association making said independent expenditures must file reports with the Federal Election Commission. These must include the person(s) name, address, the amount and purpose of the expenditures (whether in support of or opposition to a candidate who must also be named), and the office sought by the candidate.[45] The report must include "a notarized certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation or concert with, or at the rquest or suggestion of any candidate or any authorized committee or agent thereof."[46]

Moreover, to preclude circumvention of the FECA's contribution limits, the statute defines such "independent" spending as "contributions" subject to the usual limitations whenever those expenditures are:

> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made:
>
> (B) Made by or through any person who is, or has been, authorized to raise funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate's committee or agent.[47]

For those who believe in the freedom of speech that should be enough. But it gets worse. "The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered a contribution for the purpose of contribution limitations...."[48] This means that expenditures for such purposes may not exceed $1,000 for any congressional, senatorial, or presidential primary campaign. And it means that if the party has elected to take public funding then no such expenditures may be made in a general election campaign for the presidency.

In my view these regulations constitute a substantial intrusion upon the freedom of association and of speech of citizens wishing to organize and be heard on the most basic of political questions, "Who shall govern?" The $1,000 limit means, for instance, that no association which buys a single page advertisement in Newsweek or the National Review supporting its favorite candidate can safely use in that advertisement, extended quotations from the candidate's acceptance address, nor can it use quotations or logos from his brochures. It might very well be illegal to use the candidate's campaign slogans. In addition individuals and organizations wanting to make independent campaign expenditures must be very careful to have no material contact with the candidate, his/or her committee, its present or past officers. Otherwise the FEC is required by law to construe the expenditure as a forbidden or strictly limited campaign contribution.

We have seen that the language of the statute which defines an "independent expenditure" is broad. Of course no campaign committee or PAC wants to read on the front pages it is the target of an FEC investigation. Consequently, organizations taking part in federal election campaigns are inclined to be very cautious. That self censoring constitutes a serious, albeit unmeasureable, chilling of free speech. In passing the FECA Congress's goal was to prevent political corruption; our lawmakers didn't intend to inhibit political dialog. It just worked out that way.

As they drafted the FECA, Congresspersons understood that in spite of the misconduct flowing from Watergate, most political activists are not crooks. So they wrote in a provision which lets the FEC issue Advisory Opinions to political parties, candidates, individuals and committees who propose to engage in activities that might or might not be construed as violations of the act. These AO's as they are known can be relied upon by the requestor and by others in future situations of the same sort.

The lengths to which organizations must go to maintain the independent status required for making "independent expenditures" are partially outlined in the FEC's "Advisory Opinion, 1979-80." issued in response to a request from the NCPAC, the National Conservative Political Action Committee. NCPAC asked the Commission if it could engage in nine specific activities and retain its right to make unlimited expenditures aimed at defeating various Democrats who were running or were expected to run for the presidency or the Senate in 1980. Could NCPAC employ an advertising agency to design the layout and text of advertisements opposing a particular candidate in the Democratic primary, if that same agency was employed by a Republican seeking the same office? Yes, said the FEC, because the primaries are separate elections for each party, but if the candidates advanced to the general election "NCPAC would presumably be precluded from engaging the advertising firm to make independent expenditures during the general election."[49]

Could NCPAC engage as counsel an employee of a Republican who might become a senatorial candidate in a state where NCPAC proposed to make independent expenditures opposing a Democratic candidate for the same office? It could but, again, if that Republican became a candidate NCPAC could not both make independent expenditures and engage said person as counsel. Similarly, NCPAC (and therefore other organizations wanting to make independent expenditures which advocated the defeat or election of anyone, in a federal election) couldn't engage the same media time-buyer or direct mail fund raising firm used by a candidate's committee. If NCPAC provides the Republican candidate in a primary campaign with the results of polls it has taken and that Republican subsequently wins the primary, then NCPAC can not make independent expenditures in the general election in that state.[50] Taken collectively the proscriptions set forth in AO 1979-80 indicate that the broad language of activities prohibited by the FECA will be broadly interpreted. My interviews with an FEC staff attorney confirmed that this is the case.[51]

Knowledgeable, political activists understand that the FECA circumscribes their freedom of speech and association. Consider this example. In the summer of 1976, the Conservative Party of New York state held a round table discussion at its annual convention on the topic of what conservatives could do to help Ronald Reagan win the Republican Party's nomination for President. A consultant for Citizens for Reagan was invited but refused to take part. He feared the FEC might construe his participation as "coordination or consultation" and there prevent other participants from making independent expenditures in behalf of Reagan's campaign![52]

And the skeptical, perhaps hostile, attitude with which the FEC views independent expenditures was revealed by Republican Ex-Officio Commissioner Thomas Josefiak who viewed the growth of independent expenditures as "frightening." This fear he went on to explain arises because neither the candidates nor the political parties have much influence on what the independent spenders are likely to do.[53] Political analyst Michael J. Malbin observes, "Even candidates favored by the independent spending groups often are wary of them. The groups tend to be either ideological or focused on single issues."[54]

Admittedly, single issue pressure groups and ideological organizations such as NCPAC differ from the dominant coalitional politics of the American two-party system. That difference may well account for the disdain party regulars and campaign managers have for independent expenditures. But their negative attitudes scarcely warrant infringing upon the spenders' rights of association and speech. Presumably, citizens send money to organizations (e.g. NCPAC, the Christian Voice Moral Government Fund, the Nra Political Victory Fund) making independent expenditures because they sense--often correctly--that the coalition oriented major parties are not giving their favorite issue high priority. Citizens mail money to political action committees, because the PAC's will spend it on advertisements that, for instance, attack one candidate who supports abortion or oppose another who favors hand gun control. Surely those who send the checks and those who spend the money to prepare and disseminate the messages are engaged in the basic process of trying to influence the course of public policy on significant issues. They are exercising freedom of spech and association that need not be circumscribed in the name of honesty in government.

Nevertheless when, in 1980, the politically conservative "Americans for Change" was formed to raise and spend funds independently to support Ronald Reagan's bid for the presidency that effort was challenged in the courts by Common Cause. The plaintiff alleged that AFC was linked to the Republican party and Reagan's campaign committees; therefore, AFC allegedly did not qualify for independent status under the FECA. Beyond that Common Cause maintained that AFC was in violation of section 9012(f) of the Presidential Election Campaign Fund Act of 1974. This companion act to the FECA is the legislation that provides federal matching funds for the Presidential primaries and total funding (provided the candidate agrees to accept no contributions) for general election campaigns by the two major parties. Subsequently, the FEC initiated its own suit against AFC. That case and a similar one (Common Cause v. Schmitt) were consolidated in the Federal District Court for the District of Columbia.[55]

While these cases offered an opportunity for the courts to strike down the substantial restrictions on independent expenditures of the FECA, that did not transpire. As it happened section 9012(f), which limited independent expenditures by committees had not been directly challenged in Buckley and so had remained on the books, unchallenged and, therefore, unenforced.

Consequently, when the three Judge District Court handed down it's ruling in *Schmitt*, it struck down section 9012(f) as unconstitutional under *Buckley*, saying that committees, no less than individuals, were entitled to make unlimited independent expenditures to support or oppose candidates for federal office.[56] The lower court characterized the activity of PAC's as a "pooling" of the many small voices by donors who wished to speak out on the election. The act of speaking out via an independent committee was thereby distinguished from donating funds to a candidate ("speech by someone other than the contributor"), which was the *Buckley* Court's characterization of contributions to a given candidate's campaign.

The District Court stressed that the first amendment rights of PAC's are distinct from the rights of candidates. So a Presidential candidate could decide to accept the public campaign funding available under the Presidential Election Campaign Act and in the process obligate him or herself to forego accepting contributions, but in so doing neither the candidate nor the Congress can restrict the rights of others. According to the decision, "The First Amendment ensures both that persons may speak and that they may speak together."[57]

Perceptively, the court observed that the PAC's unlike candidates are bound to reflect their members' sentiments.[58] Therefore, the trial court said, when people donate to a PAC they are speaking as a group and not, as the *Buckley* Court said of donations to candidates, merely announcing that they favor candidate A instead of candidate B. This observation engages the reality, for in an American election there are normally only a couple of coalitional candidates who stand any chance of winning, but there are thousands of PAC's through which citizens can band together and speak their piece.

The District Court resolved *Schmitt* by the declaration that section 9012(f) was unconstitutional. For that reason it did not rule on the more vexatious issue of just how "uncoordinated" independent expenditures must be to remain "independent" under section 431(17) of the FECA.[59] So the constitutionality of the offensive language in 431(17) was not addressed. On appeal the lower court's decision in *Schmitt* was upheld by an equally divided Supreme Court.[60] That less than definitive judgment did nothing to clarify the questions of when "coordinated" independent expenditures become campaign contributions or whether, as I have attempted to demonstrate, that language infringes upon both free speech and freedom of association.

For eight years now the noxious language of section 431(17) has restrained those individuals and PAC's who would speak with their own voices in support of or opposition to particular candidates for federal office. Because independent expenditure PAC's are unpopular with both major parties, not to mention Common Cause and other "reform" groups, there has been little sentiment in favor of repeal.

Indeed among commentators there is at least as much talk of tightening these provisions as there is of loosening them. One law student has gone so far as to contend that the constitutionality of independent expenditures should be determined by "practical effect not whether the activity it restricts is labelled an expenditure or a contribution."[61] Another has proposed elaborate and wide-reaching criteria for determining when groups making independent expenditures are cooperating with a candidate and are thereby in violation of section 431(17) by the FECA.[62] If that were not enough, a professor of politics and an organizational consultant have proposed that the FEC should "abandon passivity in favor of developing promptly triggered auditing procedures..." which would involve "scrutiny of currently available disclosure documents..." focusing upon "...shared vendors, pollsters, advertising agencies, and political consultants..." in order to "...deeply probe for telltale signs of conflicts of interest."[63]

But we would better urge Congress and the Commission to give more attention to the promotion of political discourse and less to finding out what lobbyist is going to a cocktail party with which campaign manager. I concur with Susan Sendrow, "Independent expenditures represent the exercise of protected first amendment speech; as such their definition and regulation should be given wide latitude."[64]

Problems in FECA Administration

Beyond its policy defects, the FECA poses certain administrative difficulties. In general its enactment made electoral campaigning a regulated industry complete with all the trappings and complications that regulation normally entails. Thus the committees which conduct campaigns for federal office seekers must keep elaborate books, in which they are obliged to record the names, dates, addresses, principal occupations, and place of employment of every person who donates $50 or more to the campaign. Similar detailed accounts must be kept of all cash advances, credit card transactions, purchases and so forth. All these records, including supporting "vouchers, worksheets, receipts, bills and accounts," must be "available for audit, inspection, or examination by the Commission or its authorized representative(s) for a period of not less than 3 years after the report or statement is filed."[65]

Each quarter during election years and twice annually in off years campaign committees must file with the FEC detailed reports of their receipts and expenditures. One such report, accounting for all receipts and expenditures up to the 20th day before the relevant primary or general election, must be filed at least 12 days before said election. Similar disclosure documents are required of individuals and committees making independent expenditures in behalf of or opposition to given candidates.[66] To insure that elections are not "bought" at the last minute, gifts in excess of $1,000 received just before an election must be reported to the FEC within 48 hours of their receipt. Similarly, independent expenditures made in the closing days of a campaign must be disclosed to the Commission within 24 hours.[67]

In order to determine what impact these and other provisions of the Federal Election Campaign Act have on actual House and Senate campaigns the FEC commissioned a study by two prominent political polling organizations; one was Decision Making Information, a Republican oriented firm, the other Hart Research Associates, a company that works for Democrats. The investigators surveyed candidates and campaign managers during 1976, the first year in which the amendments of 1974 and 1976 were effective. According to the researchers' unpublished report, campaigners cited "Too much red tape, too much paperwork and too many reports" as the ways in which the FECA most hurt the campaign process.[68]

And while "Required public disclosure of campaign contributions" was the factor respondents cited most often when respondents were asked how the act "helped to improve the political campaign process," twice as many respondents thought the FECA "Didn't improve the political process" at all.[69] Though we could scarcely expect the people working in any newly regulated industry to applaud the regulations, it should be understood that the reforms of the FECA carry inevitable costs.

Record keeping and reporting may be the least offensive aspect of life with the Federal Election Commission. More troublesome perhaps is the Commission's approach to compliance. Via authorization hearings Congress has suggested the FEC focus its compliance efforts on major issues such as pressing non-filers to comply with the act's reporting requirements and expend less effort badgering those who do file about technical details in the reports which it does obtain. From interviews with committee staff members in both the Senate and the House I learned that this is a continuing source of Congressional frustration.

As one staffer for the House Administration Committee put it, "The Commissioners can't seem to recognize and distinguish minor errors from serious criminal--'knowing and intentional'--wrong doing."[70] This may be so, but it is also worth remembering that while federal agency staffers traditionally kowtow to the whims of Congressional Oversight Committee members, the FEC's staff are almost unique in this responsibility for monitoring the Congressmen's compliance with a particular federal statute. For that reason, and because reform groups including Common Cause, believe the FEC is inclined to go easy on Congresspersons, both the Commission and its staff try very hard to show no favortism toward incumbents.[71] After a lot of digging in the FEC's files I've concluded they do pretty well in that regard.

Frightening to legislators and challengers alike is the prospect that, by its compliance activity, the FEC may seriously damage a candidate's credibility with the voters. Bill Finerfrock, an aide to Iowa Senator Roger Jepsen, complained that the FEC had "announced an investigation," of his boss during the campaign but "would not announce that Jepsen was cleared."[72] Jepsen's staff was so upset with the FEC that they "didn't think it could be fixed" and would be pleased to see it abolished.[73] During his freshman year in the Senate, Jepsen was appointed to an eight member "Task Force" on the FECA. There and elsewhere he suggested that the FEC be decommissioned. Although embraced by a handful of Republicans elected in the Reagan landslide, that idea went nowhere with senior Senators who had been around Washington long enough to have lived through the devastation which Watergate brought to the nation's capital.[74]

Inasmuch as the FEC is not going to be abolished, Jepsen and other critics would better spend their energy rewriting defective policy aspects of the FECA and persuading the Commissioners to streamline its administration. For instance they might improve the FEC's compliance procedures, which, although designed to protect citizens' rights, are arguably flawed. To understand we need to be acquainted with those procedures. When on the basis of a complaint or routine review of reports, it appears to the staff that a violation of the FECA, has occurred, a preliminary examination of the matter is made by the FEC's General Counsel. The respondent (and complainant if there be one) is sent a copy of the complaint and given 15 days to show in writing that no action should be taken on it. The General Counsel recommends to the Commission either that the matter be dismissed or that it find "reason to believe" the offending party "has committed or is about to commit a violation of the statute...."[75]

A "Reason to believe" finding requires the affirmative votes from four of the Commission's six voting members.[76] The statute provides that no more than three members may be appointed from any one political party, so at least one Commissioner from each party must agree there is "reason to believe." This finding begins the second stage of the compliance process, an "investigation" that may include audits, subpoenas, depositions and so forth. Following investigation, the General Counsel recommends that the Commission close the case or "find probable cause to believe a violation has occurred or is about to occur."[77] The respondent then has 15 days to file a reply, and, at that point, if four members of the FEC find "probable cause to believe" the violation then the General Counsel attempts to resolve the matter by "conference, conciliation and persuasion."[78] If conciliation fails, then, again by four votes, the Commission can bring civil action in federal court.

Straightforward as they may be, the FEC's compliance procedures present substantial problems. First there is the hazard of "abuse" by candidates and other players on the political stage. One contender may call a press conference to charge an opponent with breaking the rules and announce a complaint is being filed with the FEC or that suit alleging violations is being filed in federal court. With or without merit such charges are bound to generate campaign publicity.

During the 1980 presidential primary season, for instance, supporters of Senator Kennedy went to federal court charging several Carter cabinet members with abusing the powers of incumbency--the power to award federal grants, appoint officers, etc.--to ensure the President's reelection. In due course a federal judge dismissed the suit, but meanwhile Kennedy force's got several good stories out of it and on advice of counsel Carter's people apparently reduced their partisan activities.[79] The same election found the Carter-Mondale Reelection Committee filing both a complaint with the FEC and a suit in federal court claiming illegal coordination between Ronald Reagan's campaign and groups organized to support his election independently.[80] Not to be outdone the independent candidate, former Congressman John Anderson of Illinois, sued the FEC twice in pursuit of matching funds. In all, the presidential election of 1980 saw six major Federal Court proceedings involving the FEC.[81] That is an unfortunate result of the FECA's making the federal campaigning a regulated industry. To an appreciable degree the contest for federal office now belongs to the lawyers and accountants rather than the candidates and their policy advisers. That this shift of power will make for better campaigns or better government is most improbable.

Conclusion

Without question enactment of the Federal Election Campaign Act has changed the way America chooses its president, senators and members of Congress. Certainly, the FECA's public disclosure provisions make it difficult for any federal office holder to hide potential conflicts of interest from the press, the public or would be electoral opponents. The act's limitations on contributions have stopped both millionaires and trade groups from donating tens of thousands of dollars to their favorite candidates and surely it has sensitized all participants in the campaign process to standards of ethical conduct that are higher--some might say inhumanly so--than those which prevailed before Watergate.

But under the *Buckley* decision the FECA makes politics a regulated industry. Inequity in the political arena is institutionalized with important advantage going to candidates who have great personal wealth over those who have wealthy and would-be-generous supporters. Far more seriously the FECA as currently interpreted places heavy and, I have argued, undesireable burdens on freedom of speech and association. As we have seen these problems include the hazard of subjecting minority parties and their supporters to public ridicule and discrimination, limiting the amount of political communication campaigners can purchase, substantially limiting the kinds of material that so-called independent committees or individuals can use in communicating with the public, and discouraging freedom of association among those who are keenly interested in electoral politics.

On balance advocates of free and robust political debate may conclude that the FECA does more harm than good. To date experience with the *unintended consequences* of this legislation gives credence to the ironic proposition that in American political life reformers of honor may do more damage than dishonorable scoundrels.

Endnotes

[1] J. Skelly Wright,"Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?" *Columbia Law Review*, 82 (1982), p. 626.

[2] Cited by Wright, p. 626.

[3] *Harver v. Virginia Bd. of Elections*, 303 U.S. 663 at 668.

[4] *Reynolds v. Sims* 377 U.S. 533 (1964).

[5] 405 U.S. 134 (1972).

[6] 415 U.S. 709 (1974) at 717-18.

[7] John Anderson, "Campaign Finance Law Balances Money's Influence," *Trial*, 13 (April 1977), p. 37.

[8] Marlene Arnold Nicholson, "Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974," *Wisconsin Law Review*, (1977), p. 336.

[9] Nicholson, p. 336.

[10] Edwin Brown, Frimage and Kay Christensen, "Speech and Campaign Reform: Congress, The Courts and Community," *Georgia Law Review*, 14 (1980), p. 227.

[11] Nicholson, p. 323.

[12] Alexander Meiklejohn, "The First Amendment is Absolute," Supreme Court Review, 245 (1961). p. 255.

[13] Whitney v. California 274 U.S. 357 (1927) 375.

[14] Alexander Meiklejohn, Free Speech and Its Relation to Self Government (1948), p. 25.

[15] Ira Glasser, "Inside the Great Campaign Finances Case of 1976", The Civil Liberties Review (September/October 1977), p. 16.

[16] 424 U.S. 1. (1976).

[17] Id. at 26.

[18] Id. at 75.

[19] FEC Record (March 1979), p. 4.

[20] Michael D. Esch, "Minor Political Parties and Campaign Disclosure Laws," Harvard Civil Rights-Civil Liberties Review," 13 (1978), 519.

[21] 435 U.S. (1978).

[22] Id, at 789, 794-95.

[23] Id. at 789.

[24] 354 U.S. 234 (1957) See the commentary of Chief Justice Warren at 251.

[25] Candidates for Congress were limited to spending $70,000 in a primary and a like amount in a general election. The limit for senatorial candidates were derived from a formula based on the state's population. FECA 1974 ss 101(a) formula based on the state's population. FECA 1974 ss 101(a) (Codified at 18 U.S.C.A. ss608 (c) (1)(E) (Supp. 1976).

[26] 424 U.S. at 41. Emphasis added.

[27] Id. at 49.

[28] Act of Oct. 15, 1974, Pub. L. No. 93-443 ss 101(a) 38 Stat. 1263.

[29] 424 U.S. at 52.

[30] Id. at 46.

[31] Id. at 22.

[32] Id. at 29.

[33] Id. at 21.

[34] Id. at 241.

[35] In fact fundraising consultant Rodney M. Smith claims that Heinz and his family spent $4 million in his first run for the Senate. See "Federal Election Law Part I: Ways Around the $1,000 Ceiling," Campaigns and Elections, 3.

[36] Mass. Gen. Laws Ann. Ch 55, ss 8 (West Supp 1977).

[37] Rosiland Rosenberg "Casenotes," *Drake Law Review*, 28 (1978-79), 719-722.

[38] Eric L. Richards, "The Rise and Fall of the Contribution/Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms," *New England Law Review*, 18 (1982/83), p. 377.

[39] 454 U.S. 290 (1981).

[40] *Id.* at 300.

[41] *Id.* at 298.

[42] Richards, p. 394.

[43] 424 U.S. at 48.

[44] 2 U.S.C. 431(17)(b).

[45] 2 U.S.C. 434(c)(a)(1).

[46] *Id.*

[47] 2 U.S.C. 431(17)(b)(4)(i).

[48] 2 U.S.C. 431(17)(b)(5)(d)(1).

[49] FEC, "Advisory Opinion 1979-80" (March 12, 1980), p. 4.

[50] *Id.* at 4.

[51] Interview with Bradley Litchfield, Assistant General Counsel, at the FEC, Washington, D.C., August, 1981.

[52] Cited by Brice M. Clagett and John R. Bolton, "*Buckley v. Valeo*, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing," *Vanderbilt Law Review*, 29 (1976), p. 1363.

[53] Interview at the FEC, Washington, D.C., August 1981.

[54] "What Should Be Done About Independent Campaign Expenditures," *Regulation*, 6 (January/February 1982), p. 41.

[55] *Common Cause v. Schmitt*, 512 F. Supp. 489. (D.D.C. 1980).

[56] *Id.* at 496.

[57] *Id.* at 500.

[58] *Id.* at 497.

[59] For a discussion of this case see for instance, Richard Claude and Judith Kirchoff, "The 'Free Market' of Ideas, Independent Expenditures, and Influence," *North Dakota Law Review*, 57 (1981), pp. 357-363.

[60] Common Cause v. Schmitt, 512 F. Supp. 489, 501 (D.D.C. 1980), aff'd per curiam by an equally divided court, 50 U.S.L.W. 4168 (U.S. Jan. 19, 1982).

[61] See the case note "Federal Election Law," by Rory L. Kagan, George Washington Law Review, 49 (1981), p. 817.

[62] Andrew P. Buchsbaum, "Campaign Finance Re-Reform: The Regulation of Independent Political Committees," California Law Review, 71 (1983), pp. 695-697.

[63] Claude and Kirchoff, p. 365.

[64] "The Federal Election Campaign Act and Presidential Election Campaign Act: Problems in Defining and Regulating Independent Expenditures," Arizona State Law Journal, (1981), p. 1005.

[65] 11 C.F.R. 102, 104.14.

[66] 11 C.F.R. 104.5.

[67] 11 C.F.R. 104.5(a).

[68] See "Study of the Impact of the Federal Election Campaign Act on the 1976 Elections," p. 148. I studied a copy of the report on file in the FEC's Library in Washington, D.C.

[69] Id. p. 143.

[70] Interview with Kathe McCright, August 1981.

[71] In a personal interview Maureen Shea of Common Cause's Washington staff characterized the Commission as exhibiting a "lot of deference toward Congress. They appear to back off on investigating incumbents."

[72] Interview, August, 1981.

[73] Multiple Interviews, August, 1981.

[74] The Task Force, skeptically dubbed "The Gang of Eight," by House staffers who decline to be quoted by name, did not bring forth any changes in the FECA.

[75] Compliance regulations are found at 11 C.F.S. section 111.

[76] 11 C.F.R. ss 111.9.

[77] 11 C.F.R. ss 111.16.

[78] 11 C.F.R. ss 111.18.

[79] David M. Ifshin and Roger E. Warin, "Litigating the 1980 Presidential Election," The American University Law Review, 31 (1982), p. 515.

[80] Id. at 517.

[81] Id. at 538.